# Secretariat File No. USA-CDA-2002-1904-02
# Certain Softwood Lumber Products from Canada
# Decision of the Panel

**ARTICLE 1904 BINATIONAL PANEL REVIEW**
**Pursuant to the**
**NORTH AMERICAN FREE TRADE AGREEMENT**

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| **IN THE MATTER OF CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA: FINAL AFFIRMATIVE ANTIDUMPING DETERMINATION** | **Secretariat File No. USA-CDA-2002-1904-02** |

## DECISION OF THE PANEL

**July 17, 2003**

Panelists: Jeffery Atik, Ivan R. Feltham, W. Roy Hines, John M. Peterson (Chairman), Leon Trakman[1]

## TABLE OF CONTENTS


I. **Introduction……………………………………………………………7**

II. **Procedural History…………………………………………………….8**

III. **Standard of Review……………………………………………………11**

IV. **Analysis………………………………………………………………...15**

A. **GENERAL ISSUES**

1. **Commerce Was Not Required to Rescind its Notice of Initiation…………………………………………………………………16**

2. **Commerce Did Not Err in its Consideration of the Impact of the Softwood Lumber Agreement (SLA) on Softwood Lumber Prices in**



[1] The panelists wish to express their appreciation for the excellent support received from Panelist Assistants Jacqueline Weisman, Esq., Mollie Coyne, Esq. and Ramnarayan Aiyer.

**Canada During the Period of Investigation……………………………………………………..21**

3. **Commerce Did Not Err in Deducting from Export Prices the Export Taxes Assessed by Canada under the Softwood Lumber Agreement………………………………………………………29**

4. **Commerce's Methodology for Calculating "Constructed Value Profit" Has Not Been Adequately Explained……………………………..34**

5. **Commerce Erred in Failing to Take Dimensional Differences Into Account in Allocating Joint Costs……………………………...45**

6. **Commerce Erred in Failing to Make An Adjustment to Account for Dimensional Differences in the Merchandise Being Compared………………………………………………………50**

7. **Commerce Did Not Err in Employing a Practice of "Zeroing" When Determining Weighted Average Margins of Dumping……………………………………………………..56**

**B. <u>COMPANY-SPECIFIC ISSUES</u>**

1. **Commerce's Decision to Treat Abitibi-Consolidated Inc. and its Affiliate, Scieries Saguenay Ltee. As a Single Producer is Unsupported by Substantial Evidence on the Record…………………………………………………61**

2. **Commerce's Decision to Allocate Abitibi's Financial Expenses on a Cost of Goods Sold (COGS) Basis for Purposes of Determining Cost of Production and Constructed Value Was Reasonable and Supported by Substantial Evidence……………………………………………………………..71**

3. **Commerce's Decision to Treat Abitibi's Goodwill Expense as a "General Expense" for Purposes of Determining Cost of Production and Computed Value is Reasonable and Supported by Substantial Evidence…………………………………………………………78**

4. **Commerce Improperly Treated Abitibi's Cost of Redeeming Certain Stock Options as a "General Expense" of Producing Abitibi's Softwood Lumber Products During the Period of Investigation…………………………84**

5. **Commerce Erred by Treating Abitibi's "Trim Blocks" as a Byproduct, Rather than as Subject Merchandise, for Purposes of Calculating Cost of Production and Computed Value……………………………………….88**

6. **Commerce's Correction of an Obvious Mistake Committed by Respondent Abitibi Was Not Erroneous and Will Not Be Disturbed………………94**

7. **Commerce Has Not Adequately Explained its Reasons for Determining Tembec's General Expenses on the Basis of Financial Data Consolidated at the Parent Company Level, Rather than the Verified Data Showing General Expenses of Tembec's Forest Products Division………………………98**

8. **Commerce Did Not Err in Treating Certain Allegedly "Unusual" Expenses Incurred by Respondent Tembec as General and Administrative Expenses, for Purposes of Calculating the Cost of Production and Computed Value in this Case…………………………………………………………………107**

9. **The Panel Remands this Case To Commerce With Directions for the Agency to Explain Why its Final Decision Did Not Contain a Clerical or Ministerial Error With Respect to Calculation of Tembec's Credit Expenses…………………………………………………………………110**

10. **The Panel Remands this Case to Commerce With Instructions for the Agency to Explain Why Its Decision to Use Tembec's Internal Prices for Wood Chips as the Basis for Calculating an Offset to Production Costs Was Reasonable………………………………………………………………112**

11. **Commerce Correctly Treated Profits Earned by Respondent Slocan on Certain Log Sales as a Separate Stream of Revenue, Rather than as Revenue from the Sale of Byproduct, and Reasonably Declined to Treat Those Revenues as Offsets to Slocan's Production Costs for Softwood Lumber………………………………………………………………116**

12. **Commerce Correctly Determined that Profits Which Respondent Slocan Earned With Respect to the Sale of Futures Contracts Constituted a Separate Revenue Stream, and Did Not Constitute Either Direct Selling Expenses or an Offset to the Company's Selling Expenses…………………………………………………………………121**

**13. Commerce Appropriately Used Prices Charged by Canfor to Affiliated Parties for Wood Chips as the Basis for Determining an Offset to Canfor's Cost of Production……………………………………………………….129**

**14. Canfor's Reporting of the Company's Sales of Dog-Eared Fencing Did Not Require Commerce to Apply "Facts Available"………………………….134**

**15. Commerce Properly Treated Weyerhaeuser's Costs of Settling Certain Hardboard Siding Litigation as Part of the Company's General and Administrative (G&A) Expenses, Which Were Allocated in Part to Canadian Softwood Lumber Production…………………………………………….136**

**16. Commerce Did Not Err by Refusing to Make an Adverse Inference With Respect to Respondent Weyerhaeuser's Allocation of United States Freight Expenses……………………………………………………………...142**

**17. The Panel Remands the Case to Commerce to Consider the Claims of Respondent West Fraser With Respect to the Calculation of that Company's Revenues on Wood Chip Sales……………………………………………..147**

**C. <u>"CLASS OR KIND" AND SCOPE ISSUES</u> ……………………………….149**

**1. Commerce Properly Determined that Western Red Cedar Did Not Represent a Separate "Class or Kind" of Merchandise……………………………………………………………..153**

**2. Commerce Correctly Held that Eastern White Pine Did Not Represent a Separate "Class or Kind" of Merchandise…………………………….157**

**3. Commerce's Decision Not to Treat Finger-Jointed Flangestock as a Separate "Class or Kind" of Merchandise is Not Supported by Substantial Evidence on the Record………………………………………………………….162**

**4. Commerce Erred When it Held that Square End Bed Frame Components Did Not Constitute a Separate "Class or Kind" of Merchandise…………………………………………………………….170**

**5. Commerce Correctly Concluded that Used Railroad Ties Did Not Constitute a Separate "Class or Kind" of Merchandise………………………….176**

**6. Commerce Correctly Included Softwood Lumber Products from the Maritime Provinces in the Scope of the Antidumping Investigation……………………………………………………………179**

**7. Commerce's Tardy and Truncated Solicitation of Comments Concerning the Scope of the Products Included Within the "Class or Kind" of Merchandise Under Investigation Did Not Violate the Parties' Due Process Rights……………………………………………………………………..182**

**CONCLUSION……………………………………………………………………..185**

**<u>Appearances</u>:**

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*United States Department of Commerce*, Office of the Chief Counsel for Import Administration (John D. McInerney, Berniece A. Browne, Robert J. Heilferty, D. Michael Stroud, Jr., William G. Isasi, Scott D. McBride, James K. Lockett, Christine J. Sohar, Linda Chang, Mark Barnett) for United States Department of Commerce, International Trade Administration

*Arnold & Porter* (Michael T. Shor) for Abitibi-Consolidated, Inc. And Scieres Saguenay Ltee.

*Baker & Hostetler*, *LLP* (Elliot J. Feldman, John J. Burke, Arland M. DiGirolamo, Michael S. Snarr), for Tembec, Inc.

*Baker & McKenzie* (B. Thomas Peele III, Kevin M. O=Brien, Lisa A. Murray) for Slocan Forest Products, Ltd.

*Piper Rudnick LLP* (John E. Corette, III, David M. Rubinstein) and Howrey Simon Arnold & White LLP (Michael A. Hertzberg, Juliana M. Cofrancesco) for The Provinces of New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, The Maritime Lumber Bureau, and Lumber Producers in the Maritime Provinces

*Kaye Scholer LLP* (Donald B. Cameron, Julie C. Mendoza) for Canfor Corporation

*Wilmer Cutler & Pickering* (Robert C. Cassidy, Jr., John M. Greenwald, Jack A. Levy) for the Quebec Lumber Manufacturers Association

*Steptoe & Johnson LLP* (W. George Grandison, Matthew Frumin, Lesley Stone) and Farris, Vaughan, Wills & Murphy (Brian R. Canfield) for British Columbia Lumber Trade Council and its Constituent Associations

*Gibson, Dunn & Crutcher LLP* (Daniel J. Plaine, Gracia M. Berg, Lisa A. Murray, Gregory C. Gerdes) for West Fraser Mills Ltd.

*Miller & Chevalier* (Matthew M. Nolan, James B. Altman, Sydney Mintzer, Sylwia A. Lis) for Weyerhaeuser Corporation

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*Patterson, Betts & Mines, P.S* (Livingston Wernecke) for Fred Tebb & Sons, Inc.

## I. INTRODUCTION

This Panel was constituted under Article 1904 of the North American Free Trade Agreement (NAFTA) to review the amended Final Determination by the United States Department of Commerce that certain softwood lumber was exported from Canada to the United States during the period April 1, 2000 to March 31, 2001 at prices that were less than fair value (LTFV). Notice of this amended determination was published in the *Federal Register* on May 22, 2002.[2]

Article 1904 of the NAFTA states:

> 1. As provided in this Article, each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.
>
> 2. An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority. Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.
>
> 3. The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise

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[2] *See Certain Softwood Lumber Products from Canada* (Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order), 67 Fed. Reg. 36, 068 (May 22, 2002), *corrected*, May 30, 2002, 67 Fed. Reg. 37,775 (May 30, 2002).

> would apply to a review of a determination of the competent investigating authority.

Article 1911 of the NAFTA provides the standard of review to be applied by this Panel:

> **standard of review** means the following standards, as may be amended from time to time by the relevant Party: ...
>
> (b) in the case of the United States,
>
> (i) the standard set out in section 516A(b)(l)(B) of the *Tariff Act of 1930*, as amended, ....

The referenced statute provides that a reviewing court "shall hold unlawful any determination, finding, or conclusion found . . . in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

In summary, this Panel, in reviewing a decision of the United States Department of Commerce, must be guided by the same principles and rules as would the United States Court of International Trade. Particular principles and rules will be discussed in this decision as relevant to the several issues raised by the parties who filed complaints against the Final Determination.

## II. PROCEDURAL HISTORY

On April 23, 2002, the United States Department of Commerce, International Trade Administration (hereinafter, "Commerce") initiated an investigation under Section 731 of the Tariff Act of 1930, *as amended* [19 U.S.C. §1673] to determine whether

*Certain Softwood Lumber from Canada* was being sold for exportation to the United States at less than fair value (LTFV) prices. The investigation was commenced following the receipt of an antidumping petition filed by the Coalition for Fair Lumber Imports Executive Committee, the United Brotherhood of Carpenters and Joiners, and the Paper, Allied-Industrial, Chemical and Energy Workers International Union, all the foregoing representing the domestic industry engaged in manufacture of a like product. *See, Notice of Initiation of Antidumping Duty Investigation: Certain Softwood Lumber Products From Canada*, 66 Fed. Reg. 21,328, April 30, 2001 ("Initiation Notice"), Public Record (P.R.) Doc. 86.

The goods subject to the investigation were described as consisting of softwood lumber products defined generally as dimensional lumber, flooring and siding and other products, classified under subheadings 4407.1000, 4409.1090, and 4409.1020 of the Harmonized Tariff Schedule of the United States ("HTSUS"). *Id.*

On April 25, 2001, in advance of issuing antidumping questionnaires, Commerce issued a letter to interested parties, including the petitioners and the 15 largest known producers/exporters of softwood lumber from Canada, soliciting comments on issues of Respondent selection, fair value comparison methodology, and possible limitation of reporting of sales and cost data. *See,* P.R. Doc. 60.

On May 18, 2001, the United States International Trade Commission (ITC) preliminarily determined that a reasonable indication existed that an industry in the United States is threatened with material injury by reason of Canadian softwood lumber imports.

Thereafter, on May 25, 2001, Commerce selected as mandatory respondents the six largest Canadian producers and exporters of subject merchandise: Abitibi-Consolidated Inc. (Abitibi); Canfor Corporation (Canfor); Slocan Forest Products Ltd. (Slocan); Tembec Inc. (Tembec); West Fraser Mills Ltd. (West Fraser), and Weyerhaeuser Company (Weyerhaeuser). Following this selection, Commerce issued antidumping questionnaires to the six mandatory respondents. The period of investigation (POI) covered by the questionnaires was April 1, 2000 through March 31, 2001.

On November 6, 2001, Commerce published notice of its preliminary determination that Canadian softwood products were being sold for exportation to the United States at LTFV prices. *Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber from Canada*, 66 Fed. Reg. 56,062 (Nov. 6, 2001)[3]. From December 2001 through February 2002, Commerce verified the responses submitted by the six mandatory respondents in the investigation. During January and February 2002, Commerce issued its verification reports.

On February 25, 2002, Commerce held a public hearing on all issues in the investigation except for scope-related issues. On March 19, 2002, Commerce held a public hearing on scope-related issues that had been analyzed during the course of the investigation.

[3] On February 11, 2002, Commerce published an amendment to the preliminary LTFV determination excluded from the scope of the investigation certain specified softwood lumber products, including certain stringers, box spring frame kits containing radius-cut side and end rails, radius-cut box spring frame components, fence pickets, United States-origin lumber shipped to Canada for minor processing and returned to the United States, and softwood lumber products contained in single family home packages and kits.

On March 21, 2002, Commerce issued a final affirmative LTFV determination, which was published in the *Federal Register* on April 2, 2002. *See, Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber from Canada*, 67 Fed. Reg. 15,539 (April 2, 2002). The Final Determination was accompanied by the publication of an *Issues and Decision Memorandum* (IDM), which described the basis for Commerce's Final Determination in detail.

On May 16, 2002, the International Trade Commission (ITC) notified Commerce of its final determination that the industry in the United States producing softwood lumber products is threatened with material injury by reason of imports of the subject merchandise from Canada.

On May 22, 2002, Commerce published its *Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Softwood Lumber from Canada*, 67 Fed. Reg. 36, 068 (May 22, 2002). Commerce also published a final *Antidumping Duty Order.*

Following receipt by the NAFTA Secretariat of requests for binational panel review of various aspects of the Final Determination, the instant Panel was constituted.

## III. STANDARD OF REVIEW

Article 1904(3) of the NAFTA requires that this Panel apply the standard of review and "general legal principles"[4] that a U.S. court would apply in its review of a

[4] These principles include, for instance, "standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." NAFTA Article 1911.

decision of the competent investigating authority.[5] The standard of review that a reviewing court and, consequently, this Panel, must apply is dictated by section 516A(b)(1)(B) of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1516a(b)(1)(B), which requires the Panel to "hold unlawful any determination, finding, or conclusion found … to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." *Id.*[6]

Substantial evidence has been defined by the Supreme Court as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Substantial evidence "is something less than the weight of evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). Nevertheless, an agency determination must be supported by the administrative record as a whole, including evidence that detracts from the substantiality of the evidence relied upon by the agency. *See, Universal Camera*, 340 U.S. at 477.

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[5] Under the FTA, an Article 1904 Binational Panel Review of an agency determination in a United States antidumping duty proceeding must be conducted in accordance with U.S. law. NAFTA Article 1902(1).

[6] For purposes of Panel review, the "law" consists of "relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials." NAFTA Article 1904(2). The "substantial evidence" standard mandated by the NAFTA refers specifically to evidence "on the record", and Article 1904(2) of the NAFTA expressly limits the Panel's review to the "administrative record" filed by the competent investigating authority.

Under the substantial evidence standard the reviewing Panel must not reweigh the evidence, or substitute its judgment for that of the agency. *Fresh, Chilled and Frozen Pork from Canada*, USA-89-1904-11, at 8 (Aug. 24, 1990); *see also Metallverken Nederland B.V. v. United States*, 728 F. Supp. 730, 734 (Ct. Int'l Trade 1989). It is well settled that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620; *see also Matsushita Elec. Indus. Co.*, 750 F.2d at 933 ("The [agency's] decision does not depend on the 'weight' of the evidence, but rather on the expert judgment of the [agency] based on the evidence of record.") The reviewing authority therefore may not "displace the [agency's] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp.*, 340 U.S. at 488; *accord American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom. Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985).

The substantial evidence standard generally requires the reviewing authority to accord deference to an agency's factual findings and to the methodologies selected and applied by the agency. *See, e.g.*, *American Silicon Techs. v. United States,* 2003 U.S. App. LEXIS 13506 (Fed. Cir. 2003); *Micron Tech., Inc. v. United* States, 117 F.3d 1386, 1394 (Fed. Cir. 1997); *Hercules, Inc. v. United States*, 673 F. Supp. 454, 463 (Ct. Int'l Trade 1987)(agencies have "broad discretion in the enforcement of trade laws.")(quoting *Manufacturas Industriales de Nogales, S.A. v. United States*, 666 F. Supp. 1562, 1567 (Ct. Int'l Trade 1987)); *see also Brother Industries, Ltd. v. United States*, 771 F. Supp. 374,

381 (Ct. Int'l Trade 1991) ("Methodology is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion."). Agency determinations are presumed to be correct, and the burden of demonstrating otherwise is on the party challenging a determination. 28 U.S.C. § 2639(a)(1); *see, Hannibal Industries, Inc. v. United States*, 710 F. Supp. 332, 337 (Ct. Int'l Trade 1989).

Although review under the substantial evidence standard is by definition limited, the Panel nonetheless must conduct a meaningful review of Commerce's determination. It is well established, for instance, that an agency's determination must have a reasoned basis. *See, American Lamb Co. v. United States*, 785 F.2d 994, 1004 (Fed. Cir. 1986)(citing S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 638). The reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning. *See, USX Corp. v. United States*, 655 F. Supp. 487, 492 (Ct. Int'l Trade 1987).

Furthermore, there must be a rational connection between the facts found and the choice made by the agency. *See*, *Bando Chem. Indus., Ltd. v. United States*, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992) (citing *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). There must be an adequate explanation of the bases for the agency's decision in order for the reviewing authority meaningfully to assess whether the decision is supported by substantial evidence on the record. The agency therefore must clearly articulate the reasons for its conclusions. *See, e.g.*, *Mitsubishi Materials Corp. v. United States*, 820 F. Supp. 608, 623-24 (Ct. Int'l Trade 1993).

The agency determination must be grounded in the record evidence; substantial evidence must consist of facts that support the agency's findings. *See, Baltimore & O.R. Co. v. Aberdeen & R.R. Co.*, 393 U.S. 87, 91-92 (1968). Where there is conflicting evidence, there must be "some justification, supported by substantial evidence in the record," for relying on one set of facts over another. *Timken Co. v. United States*, 894 F.2d 385, 388-389 (Fed. Cir. 1990). The Panel determines the existence of substantial evidence by considering the record as a whole, including evidence that supports as well as evidence that "fairly detracts from the substantiality of the evidence." *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

Finally, in reviewing an agency's construction of a statute it administers, the Panel will defer to the agency's reasonable interpretation of the statute, if not contrary to an unambiguous legislative intent as expressed in the words of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Timex, V.I., Inc. v. United States*, 157 F.3d 879, 881-882 (Fed. Cir. 1998). The Panel will also accord substantial deference to the agency's interpretations of its own regulations. *See*, *Torrington Co. Inc. v. United States*, 156 F.3d 1361, 1363-64 (Fed. Cir. 1998).

## IV. ANALYSIS

In briefing and at oral argument, the parties to this Proceeding organized the contested issues into three basic categories: (A) "general" issues, whose determination is likely to affect multiple parties to the proceeding; (B) "company

specific" issues, whose determination is likely to affect individual companies; and (C) "scope" issues, involving the determination of the "class or kind" of merchandise subject to Commerce's investigation and contested determination. For good order's sake, the Panel's decision follows this organization in dealing with the issues raised by the parties.

## A. GENERAL ISSUES

### 1. Commerce Was Not Required to Rescind its Notice of Initiation

Several Respondents[7] contend that Commerce's investigation was initiated contrary to the requirements of antidumping law. Their primary contention is that the antidumping petition unreasonably omitted information regarding Canadian prices that was reasonably available to Petitioners, that the information was material to Commerce's decision to reject Canadian prices in determining the prices of softwood lumber, and that had Petitioners disclosed such material information, Commerce reasonably would have relied on Canadian softwood lumber prices instead of extrapolating prices on the basis of U.S. data.

In support of these contentions, the Respondents allege that International Paper, a member of the Petitioner coalition, unreasonably withheld information regarding

[7] For ease of reference, the Panel's decision refers to the Coalition for Fair Lumber Imports Executive Committee as the "Petitioner", and refers to the firms and associations who opposed the petition as "Respondents", without regard to the party's status with respect to any individual pleading filed with the Panel.

Canadian prices that was known by its wholly owned Canadian subsidiary, Weldwood. They contend that, by virtue of the failure to disclose this information, the antidumping petition was inherently defective and that Commerce's decision to initiate an investigation of the claims contained in the petition ought to be rescinded. In arguing that Petitioners acted deliberately, Respondents also allege that International Paper purposefully deleted its relationship to Weldwood from the "relationship list" submitted to Commerce.[8]

Respondents allege further that the Petitioners clearly were aware of Canadian prices, given their purchase of softwood lumber from at least three of the Respondents.

Relying on the decision of the United States Court of International Trade (CIT) in *Gilmore Steel Corp. v. United States,* 585 F. Supp. 620 (1984) to support their contentions, Respondents ask the Panel to hold that Commerce erred in failing to rescind the notice of investigation in this case. They contend, in their Joint Brief, that the "Petitioner's decision to omit the Weldwood data from the Petition, and to misrepresent to Commerce the availability of those data, rendered the Petition legally inadequate and deprived Commerce of the statutory authority to initiate the antidumping investigation pursuant to 19 USC §1673a(b)."[9]

Commerce responds that sufficient information was made available to it in order to decide whether to proceed with an antidumping investigation, that such information reasonably established that some dumping of Canadian softwood lumber in the United

[8] *See, e.g.,* Transcript of Oral Argument Before the Panel ("Tr.") at Vol. II, p. 188 (Oral arguments by Michael T. Shor).

[9] *See* Tr. at Vol. I, p. 34 (Oral argument by Mr. John Greenwald); *see also* Tr. at Vol. III, p. 15 (Rebuttal statement by Mr. Greenwald).

States had occurred, and that Commerce's use of such information was reasonable in reaching its decision to initiate and conduct an antidumping investigation, regardless of whether there was other available or new pricing data, such as Respondents attribute to Petitioners.

Commerce maintains, further, that it is not required to take account of transaction specific data, and that it is entitled to rely on observed and constructed data in determining whether or not to proceed with a antidumping investigation following initiation. The agency states that it was reasonably satisfied throughout the process of initiation that sufficient evidence was available to it to demonstrate that dumping had occurred, that the agency has discretion to decide whether or not to proceed to an antidumping investigation, and that it reasonably exercised that discretion in this case. Moreover, Commerce argues that, if the Petitioners had data available to them in regard to Canadian softwood lumber prices that did not demonstrate the presence of dumping, Petitioners were not required to provide all that data in the petition.

Commerce distinguishes *Gilmore*, *supra*, noting that there was a lack of industry support for the antidumping petition in that case, depriving petitioners of legal standing, and that this is not so in the instant proceeding.[10]

Petitioners contend that they provided Commerce with information that was both reasonably available to them and accurate. They assert further that the Petition need merely provide a reason to investigate, rather than all information that may be available.[11] Petitioners also deny that they deliberately withheld information from Commerce, or

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[10] ***See, e.g.*,** Tr. at Vol. I, p. 140 (Oral argument by Ms. Linda Chang).

[11] *See, e.g.*, Tr. at Vol. II, p. 46 (Oral argument by Mr. Bradford Ward).

intended to mislead it about the Canadian prices of softwood lumber. They maintain that they received no communication from Weldwood in regard to Canadian prices, that Weldwood was bound by a duty of confidentiality to other Canadian producers and that International Paper was not privy to Weldwood prices on that account. Petitioners also maintain that Commerce is not restricted to the Petition in deciding whether to proceed with an antidumping investigation.

The Panel determines that Commerce acted within its lawful authority in proceeding with an antidumping investigation following initiation. Commerce also acted reasonably in determining the extent to which it would rely on the Petition in deciding to proceed with the investigation. In so deciding, the Panel is cognizant of the applicable standard of review of reasonableness and the deference that ought to be accorded to Commerce in determining whether the information available to it is reasonably adequate to initiate a dumping investigation.

Commerce's regulations [19 C.F.R. §353.203] contain guidelines for determining the sufficiency of an antidumping petition filed with the agency. The regulation directs the Secretary of Commerce to conduct this review "on the basis of sources readily available to the Secretary", and to examine the accuracy and adequacy of the evidence provided in the petition in determining whether to initiate an antidumping investigation. Neither the statute nor the regulations explicitly require that a petition contain all information publicly or privately available concerning the allegations made in the petition. Furthermore, it is not anticipated that every allegation contained in a petition will necessarily be verified as true.

In *Luciano Pisoni Fabbrica Accessori Instrument Musicali v. United States*, 640 F. Supp. 255 (Ct. Int'l Trade 1986), Respondent in an antidumping investigation contended that the petition lacked up-to-date pricing information, and that the investigation commenced following review of the petition should be rescinded. The Court of International Trade disagreed, noting that:

> Commerce has some discretion in deciding whether to initiate an investigation. Commerce is permitted to assess the sufficiency of a petition "in light of its own knowledge and expertise and facts capable of judicial notice". *United States v. Roses, Inc.*, 706 F.2d 1563, 1568-69 (1983).

640 F. Supp. at 257. The court also noted that "the statutory scheme offers no basis for plaintiff's position that Commerce is required to rescind a notice of initiation upon discovering inaccuracies in a petition". *Id.* at 258.

Moreover, since the antidumping statute requires that data relied upon in making a final determination be verified, the fact that information contained in a petition may subsequently be found to be inaccurate, outdated or incomplete is of no moment. As the court held in *Luciano Pisoni, supra*:

> In making a final determination in an investigation, Commerce must verify all information on which it relies. Corrections to petitioners' data are the very point of verification procedures. It is therefore proper for Commerce to complete an investigation commenced after a petition is filed by an interested party even when a petition is determined to contain inaccuracies. Since Commerce is authorized to commence an antidumping duty petition *sua sponte* whenever it determines that an investigation is warranted, it would be unreasonable to require that Commerce terminate an investigation commenced after the filing of a petition by an interested party when, despite inaccuracies contained in the petition, it finds evidence of sales at less than fair value.

*Id.* at 258 (citations omitted).

The Panel notes further that *Gilmore* is materially different from the instant case since the lack of industry support for an antidumping investigation there deprived the would-be petitioners of standing to request an antidumping investigation -- a situation not present in the instant case.

Commerce therefore did not err by initiating and continuing the investigation.

### 2. Commerce Did Not Err in its Consideration of the Impact of the Softwood Lumber Agreement (SLA) on Softwood Lumber Prices in Canada During the Period of Investigation.

Respondents contend that Commerce failed to consider the effects of the Softwood Lumber Agreement[12] on prices in Canada during the period of investigation (POI) in this case. The gravamen of Respondents' complaint is stated as follows:

> In comparing prices for export sales to the United States with sales in the home market, Commerce has discretion to disregard home market sales that are below cost as calculated by the Department on the grounds they are not "in the ordinary course of trade." The statute recognizes that some sales below cost will occur even in normal circumstances. *See* 19 U.S.C. § 1677b(b)(1). For example, the Department may not disregard below cost sales if they are less than 20 percent of home market sales. *See* 19 U.S.C. § 1677b(b)(2)(c)(i).

[12] Effective April 1, 1996, the Governments of the United States and Canada entered into a *Softwood Lumber Agreement* ("SLA") designed to regulate certain aspects of bilateral trade in softwood lumber products. By its terms the SLA was "intended to ensure that there is no material injury or threat thereof to an industry in the United States from imports of softwood lumber from Canada". The SLA provided, *inter alia*, that Canada was to collect a fee on the issuance of a permit for export to the United States of softwood lumber first manufactured in the provinces of Ontario, Quebec, British Columbia, or Alberta for quantities above a "base level" in a given year. This fee is referred to in this opinion as the Softwood Lumber Agreement (SLA) tax. The tax did not apply on exports from Canada of the first 14.7 billion board feet in each agreement year. A fee equal to a "lower fee" base was applied to exports of more than 14.7 and less than or equal to 15.35 billion board feet of softwood lumber in each agreement year. For exports in excess of 15.35 billion board feet, a higher tax (upper fee base) was charged.

The SLA was an agreement with a five-year duration, and expired on March 31, 2001.

> In making its sales comparisons in this case, Commerce ignored the effect of the SLA and mechanically disregarded below cost home market sales of a particular product whenever they exceeded 20 percent of such sales. Because lower lumber prices in the Canadian home market were an inevitable result of the SLA, such low priced sales were in the ordinary course of trade during the five years covered by the Agreement, which included the period covered by Commerce's investigation. Commerce had an obligation to consider the effect of the SLA on Canadian lumber prices when exercising its discretion to determine what home market sales were in the ordinary course of trade. If Commerce had treated such sales as within the ordinary course of trade – as they were during the period of the SLA – it would have found no dumping[13].

Respondents assert that during the POI prices in Canada were significantly lower than prices at which lumber was sold into the US market:

> Canadian producers operating under the SLA ... had an incentive to sell quantities of lumber that exceeded their allotted SLA quotas to customers in the Canadian domestic market. This incentive persisted until the sales volume added to Canadian supply had suppressed Canadian prices to the point where the added cost of selling such lumber to the United States and paying the SLA export tax was offset by the difference between higher U.S. and lower Canadian prices. As a result, the SLA caused lumber prices in Canada to decline and prices in the United States to increase as it restricted the flow of exports to the United States and diverted that lumber into the Canadian market. Since the Canadian market for softwood lumber is less than one-sixth the size of the U.S. market, the price effects of the SLA were far more pronounced in the Canadian market than in the United States[14] [footnote omitted].

Based on that state of the market in Canada, Respondents argue that Commerce should have exercised its discretion to regard sales below Cost of Production (COP) as having been made in the ordinary course of trade, rather than disregard those sales. Essentially, Respondents' complaint is that Commerce, by neglecting the effect of the

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[13] *Respondents' Joint Brief* at Vol. I., p. 100-101

[14] *Id.* at Vol. I., p. 102.

SLA on prices in Canada, failed to achieve a fair comparison between normal value and export price, as required by 19 U.S.C. § 1677b(a)(1)(B).[15]

Commerce dealt with the issue in the *Issues and Decision Memorandum* ("IDM") which accompanied the *Final Detemination* as follows:

> As to whether {the} SLA has distorted Canadian and U.S. *timber prices*, we find that the likely distortion is at most minimal. Moreover, removing all "distortion" would be nearly impossible.
>
> A border measure, such as the SLA, could affect a market-oriented timber industry across North America by driving down stumpage prices in Canada and driving up *stumpage* prices in the United States. However, we find that this theory is not applicable to the facts of this case. Moreover, throughout the duration of the SLA, Canadian lumber exports to the United States consistently exceeded the specified volume thresholds that triggered the export fees. Therefore, it is unclear to what extent, if any, the SLA actually constrained the quantity of lumber exported to the United States. For all these reasons, the SLA likely did not cause any significant distortion of *lumber prices* in the *United States* during the POI. However, even if the SLA had caused a substantive distortion, it is unclear whether, how, and under what circumstances we could account for any distortion.

IDM at Comment 2 [emphasis as added in Respondents' Joint Brief].

Regarding the statement quoted above, Respondents argue that the references to timber and lumber prices in the United States indicate that Commerce failed to consider the effect of the SLA on *lumber* prices in Canada, referring to 19 U.S.C. § 1677f(i)(3)(A), which requires that Commerce's final determination provide "an explanation of the basis for its determination that addresses relevant arguments, made by interested parties . . . , concerning the establishment of dumping . . . ."

15 *Id.* at Vol. I, p.109.

Commerce responds that Respondents placed "little emphasis on the 'distortive' effects of the SLA in their case briefs. Certainly no party advanced any substantive proposal for how Commerce should quantify the 'distortive' effect of the SLA or how such a distortion should be accounted for in its dumping analysis under U.S. law."[16] Commerce then argues that Respondents are presenting a new argument before the Panel that should be rejected for failure to exhaust administrative remedies. Moreover, argues Commerce,

> ... the new arguments should be taken with a large helping of salt.
>
> For example, Respondents state that "[n]owhere does Commerce actually address the question of the SLA's impact on prices for lumber in the Canadian market and whether the resulting lower priced Canadian sales were in the ordinary course of trade for purposes of calculating normal value." Joint Brief 107. Given that this theory was never advanced before Commerce, it is unreasonable to expect the agency to have addressed it. Even were Commerce to entertain such an argument, Commerce has rarely found sales that fail the statutory cost test to be in the ordinary course of trade, as generally sales sold in substantial quantities over an extended period of time which do not permit the recovery of all costs within a reasonable period of time are, by their very nature, outside the ordinary course of trade.
>
> Finally, Respondents improperly attempt to support their new theory with information that was not part of the administrative record. See Joint Brief at 107 (supporting its argument with findings by the ITC made several weeks after the date of Commerce's determination.)
>
> For these reasons, Commerce acted reasonably and in accordance with law when it addressed the minimal arguments related to the alleged (and never quantified) distortions caused by the SLA. [17]

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[16] *Commerce Brief,* Vol. I at p. 72-73.

[17] *Id.* at p. 74.

For their part, Petitioners contend that the effects of the SLA are legally irrelevant in this case. They submit that Commerce is required to examine whether and to what extent dumping has occurred as opposed to *why* the dumping occurred. In support they assert:[18]

> The statute plainly states that "[i]f the administering authority determines that sales made at less than the cost of production -- (A) have been made within an extended period of time in substantial quantities, and (B) were not at prices which permit recovery of all costs within a reasonable period of time, such sales may be disregarded in the determination of normal value."[19] The statute further makes clear that sales disregarded as below cost "shall" be considered to be outside the ordinary course of trade.[20] Those conditions were plainly met in this case.
>
> Canadian Parties' claims to the contrary notwithstanding, the statute does not obligate the Department to find below-cost sales made over an extended period of time in substantial quantities to be within the ordinary course of trade. Plainly, having the discretion under law to do something and being obligated under the law to do something are quite different. Not only is the Department not required to find sales below cost to be within the ordinary course of trade, but its practice has been consistent in treating sales failing the statutory cost test to be <u>outside</u> the ordinary course of trade.[21]
>
> Further, the URAA SAA supports the Department's determination. It states, "[i]f home market . . . sales are below-cost and all of the criteria of section 773(b) are satisfied, Commerce may exclude such sales for

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18 *Petitioners' Response Brief*, at 65-67.

19 Citing 19 U.S.C. § 1677b(b)(1).

20 Citing 19 U.S.C. § 1677(15) (2001).

21 Citing 19 C.F.R. § 351.406 (2001). *See, e.g., Top-of-the-Stove Stainless Cooking Ware from the Republic of Korea*, 67 Fed. Reg. 62,951, 62,954 (Oct. 9, 2002) (Preliminary Results and Rescission, in Part, of Antidumping Duty Administrative Review) ("Cooking Ware from Korea"); *Certain Cold-Rolled Carbon Steel Products from France*, 67 Fed. Reg. 31,204, 31,209 (May 9, 2002) (Preliminary Determination of Sales at Less Than Fair Value) ("Cold-Rolled Steel from France"); *Silicomanganese from Venezuela*, 66 Fed. Reg. 56,635, 56,638 (Nov. 9, 2001) (Preliminary Determination of Sales at Less Than Fair Value) ("Silicomanganese from Venezuela"); *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 22,146, 22,150-51 (May 3, 2001) (Preliminary Determination of Sales at Less Than Fair Value) ("Hot-Rolled Steel from the Netherlands").

> purposes of determining normal value. *The Administration intends that Commerce will disregard sales when the conditions in the law are met*."[22] There is no question in this case that the conditions in the law were met, as the Department determined: Canadian Parties sold lumber below cost in substantial quantities over an extended period of time. Accordingly, the Department was consistent with the statute, its precedent, and the plainly expressed intent of Congress when it excluded from the calculation of normal value all sales that failed the statutory cost test.
>
> The URAA SAA does state that "in some cases, below-cost sales may be used to determine normal value if those sales are of obsolete or end-of-model-year merchandise" if exports of that merchandise to the United States are "similarly obsolete or end-of-model year."[23] However, it is important to note two elements of the exception to the general rule. First, the exception provides the Department with the discretion to include certain types of sales failing the statutory cost test but does not require their inclusion. Second, the exception is expressly linked to certain types of products such as "obsolete" or "end-of-model year" merchandise and particularly perishable agricultural products (such as flowers) not at issue here.[24] Clearly, lumber does not fall into these exceptions. As such, the Department had no reason to contravene its standard practice of excluding sales failing the statutory cost test.

In reply, Respondents note that Commerce first asserts in the IDM that the issue was not raised by Respondents during the investigations, then proceeds to assert that it adequately responded to the Respondents' argument in the IDM. Respondents' citations to the record indicate that the matter was raised by at least some of the Respondents.[25] The issue was thus placed before Commerce and needed to be addressed by Commerce.

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[22] Citing Uruguay Round Agreement Act, Statement of Administrative Action at 833 (emphasis added).

[23] Citing URAA SAA at 833 (emphasis added).

[24] In a footnote, Petitioners asserts that "While some Canadian parties below attempted to characterize lumber as akin to a perishable agricultural product, that position is plainly absurd. Lumber does not "spoil" in the same manner as fresh roses or asparagus".

[25] *See, Respondents' Joint Reply Brief* at p. 57.

On the substantive issue, Respondents base their case on the requirement of U.S.C. §1677b(a) that a "fair comparison *shall* be made between export price or constructed export price and normal value" in determining whether subject merchandise has been dumped into the U.S. market. (emphasis added). Respondents assert:[26]

> Commerce failed to take into account the effect of the SLA in determining which sales were in the ordinary course of trade in Canada. As a result, in nearly all the comparisons where Commerce found dumping, the average normal value calculated by Commerce was artificially inflated because lower-priced Canadian sales were disregarded as outside the ordinary course of trade. *Jt. Initial Br. (Vol. I)* at 105. Indeed, well over one-third of the dumping margin found for the Canadian Respondents was based on less than two percent of the relevant Canadian home market sales. As a consequence of Commerce's failure to take into account the effect of the SLA in Canada, the dumping found in this case was not based on fair comparisons.
>
> Commerce has recognized that it "must administer the antidumping law in a manner which reflects economic reality and is consistent with the basic purpose of the Act," and that "{i}n determining when to exclude below-cost sales from computation of fair value, one must interpret the language of the statute in light of the normal business practice of the industry subject to the investigation." *Certain Fresh Winter Vegetables from Mexico*, 45 Fed. Reg. 20,512, 20,514 and 20,515 (Mar. 28, 1980), *aff'd,* 584 F. Supp. 10 (Ct. Int'l Trade 1984) ("*Winter Vegetables*"). In *Winter Vegetables*, after analyzing business practices in the North American market for winter vegetables during the period of investigation, Commerce found that the governing statute provided "sufficient flexibility" to allow it to take the economic circumstances into account in order to implement the purpose of the law. *Id.* at 20,516.

Respondents thus assert that Commerce failed to take the effect of the SLA into account in its dumping analysis, and failed to meet its obligation to "include in a final determination . . . an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation . . . , concerning the establishment of dumping . . ." 19 U.S.C. § 1677f(i)(3)(A). Respondents

[26] *Id.* At 59-60.

argue that the economic reality of the market in Canada while the SLA was in effect was that sales below fully allocated costs were normal during the period investigated. Respondents refute the assertion by Petitioners that a profit maximizing company would not sell "below cost" by drawing attention to the well-established practice of selling at a price to equal to or exceeding marginal cost, thus contributing to the liquidation of fixed costs.

The antidumping law does not deal directly with the rationality of selling below fully allocated costs but in excess of marginal cost. Rather, the statute requires that consideration of sales in the exporter's home market begin (as relevant to this analysis) with a determination of whether any sales are below cost of production (i.e., fully allocated costs as defined by § 1677b(b)(3)), and, if so, then consider whether they are to be disregarded in determining normal value. The statute permits Commerce to disregard such sales, but does not require that it do so. The word "may" confers authority to exercise judgment as to when such sales should be disregarded and when not. Any reasonable exercise of judgment by Commerce will satisfy its responsibility. The exercise of judgment requires that the issue be addressed and considered in the light of the evidence on the record.

Commerce applied its longstanding practice of excluding sales below cost of production, as that concept is defined in the antidumping law of the United States, when determining the normal value of subject merchandise. The practice is approved by the Statement of Administrative Action relating to the Uruguay Round Agreements Act,

which statement is to be given effect.[27] Cases in which sales below cost of production have been found to be in the ordinary course of trade are rare, as reflected in the Statement of Administrative Action and illustrated by *Southwest Florida Winter Vegetable Growers Assn. v. United States*, 584 F. Supp. 10 (Ct. Int'l Trade 1984) While ambiguous,[28] the Statement of Administrative Action authoritatively indicates the narrow scope for exceptions.[29] Respondents therefore faced a substantial challenge to show that lumber prices in Canada during the period of investigation were in the ordinary course of trade. Although the treatment of the issue in the IDM is perfunctory and dismissive of Respondents' arguments, Respondents have not provided an analysis of the Canadian market during the period of investigation (the fifth year of the operation of the SLA) that would quantify the effect of the SLA and that would satisfy the burden of showing that Commerce' determination on the matter is not in accordance with the law. Accordingly, the Final Determination is affirmed with respect to the issue about the effect of the SLA on softwood lumber prices in Canada during the period of investigation.

### 3. Commerce Did Not Err in Deducting from Export Prices the Export Taxes Assessed by Canada under the Softwood Lumber Agreement.

[27] Uruguay Round Agreements Act, 19 U.S.C. § 3511(a)(2); § 3512(d).

[28] "...the Administration intends that Commerce will interpret section 771(15) [19 U.S.C. §1677(15); definition of ordinary course of trade] in a manner which will avoid basing normal value on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results." SAA, Section B. 4, "Ordinary Course of Trade".

[29] SAA, Section B. 3, "Exclusion of Sales Below Cost from Determination of Normal Value"

Respondents argue that Commerce's decision to reduce U.S. export prices by the amount of the export taxes paid under the Softwood Lumber Agreement (SLA) is not supported by substantial evidence or otherwise in accordance with law.

As a result of negotiations between Canada and the United States, the SLA (applicable from April 1, 1996 to March 31, 2001) subjected lumber from certain Canadian provinces to an export tax on shipments to the United States, when shipments of such lumber exceeded 14.7 billion board feet per year. Following expiry of the SLA, Petitioners immediately requested new antidumping and countervailing duty investigations. In this antidumping investigation, Commerce, in calculating export prices and constructed export prices (CEP) during the POI, adjusted the prices to deduct therefrom the SLA export taxes paid by Respondents[30] and used values relating to shipments that included the SLA taxes. In a countervailing duty case launched at the same time as this antidumping investigation, the agency found that countervailable subsidies were bestowed on lumber exports from Canada[31].

Respondents allege that Commerce's decision to deduct the annualized SLA tax for shipments of subject merchandise to the U.S. was contrary to the intent of Congress. In this connection, they maintain that the SLA taxes were imposed in lieu of a countervailing duty to offset a subsidy found by the agency on the subject goods, that these amounts were reflected in the prices charged to U.S. importers, and that deducting these amounts from the export prices effectively increases the margin of dumping by an equivalent amount for goods subject to this

[30] As noted above, the SLA only applied to softwood lumber exported from certain Provinces, and only to lumber exported in excess of 14.7 billion board feet per year. In adjusting export price and CEP, Commerce allocated the SLA tax paid by each Respondent over the total price of softwood lumber exported by the Respondent.

[31] *See Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,545, 15,547 (Apr.2, 2002).

investigation – in effect, asking firms to pay the tax again in the form of antidumping duties. Respondents cite 19 U.S.C. § 1677(6)(C)[32] in arguing that this tax qualifies for the exemption to the requirement set out in 19 U.S.C. §1677a(c)(2)(B)[33] regarding the deduction of an export tax when calculating export price. Further, they claim that the wording of 19 U.S.C. §1677(6)(C) makes clear that Congress intended that taxes specifically intended to offset a subsidy should be taken into account in Commerce's calculations. Alternatively, Respondents note that the SLA tax involves elements comparable to those covered in suspension agreements, to the extent that the governments of Canada and the United States entered into a voluntary arrangement specifically designed to address subsidy practices and the avoidance of U.S. countervailing duties. Respondents argue that the agency's decision to deduct the SLA tax in calculating export and constructed export price is not in accordance with the law.

Commerce's asserts that 19 U.S.C. §1677(6)(C) is unambiguous in requiring that, to qualify for this exemption, the tax must be "specifically intended to offset the countervailable subsidy received." The agency notes that the intent of the SLA was to ensure that there was no material injury or threat thereof to an industry in the United States due to imports of softwood lumber from Canada, that the SLA was not negotiated under the countervailing duty or suspension agreement provisions of the Act, and that there is no reference to a countervailable subsidy in the SLA. Commerce also notes that the tax provided for in the SLA, unlike a

[32] For the purpose of determining the net countervailable subsidy, the administrating authority may subtract from the gross countervailable subsidy the amount of – (C) export taxes, duties or other charges levied on the export of merchandise to the United states specifically intended to offset the countervailable subsidy received.

[33] The price used to establish export price and constructed export price shall be –(2) reduced by – (B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country of the subject merchandise to the United States, other than an export tax duty or other charge described in section 1677(6)(C).

countervailing duty, only applied to exports above a certain quantity (14.7 billion board feet). No tax was imposed on quantities below this volume. Accordingly, the agency determined that this particular tax did not meet the definition as set out in section 1677(6)(C) for the exemption described in section 1677(c)(2)(B). Petitioner concurs with the decision of the agency.

The issue in this case is whether the deduction of the SLA export tax from the export price or constructed export price to United States purchasers was appropriate in the context of establishing whether dumping was taking place and, if so, the margins of dumping involved. In considering this matter it is important to note that (1) the prices used by Commerce in its calculations relate to sales made during a period when the SLA was operational (the POI), (2) the SLA tax only applied to sales above a certain level and (3) the agency annualized the tax for each Respondent to derive an export tax expense per MBF sold during the POI. At the present time, cash deposits are being paid based on the estimated amount of the dumping duties as calculated by the agency. On the anniversary of the Order companies can request an administrative review based on the actual prices that were involved on the specific transactions.[34]

Record evidence establishes that the SLA tax was put in place in an attempt to reach agreement on a mechanism that would replace countervailing duties that might otherwise have been imposed by the agency if an investigation resulted in a determination that certain Canadian practices constituted countervailable subsidies. The relationship between a received subsidy practice and the initiation of countervailing investigations is evident. It is also clear from the record that there was no countervailing duty investigation underway nor was a countervailing duty in place at the time the SLA was agreed. At the same time, section 1677(6)(C) is explicit in requiring that the export tax be specifically intended to offset the countervailable subsidy

[34] *See,* Tr. at Vol. I, p. 112 (Mr. Michael T. Shor).

received. In this instance, while the SLA tax was designed to alleviate a situation in which countervailing duties might have been imposed, the tax itself did not offset a countervailing duty. Neither did it offset the full amount of any subsidy that might have applied on individual shipments of subject merchandise because (a) it only applied to exports that exceeded an agreed volume and (b) the tax paid by producers to the Canadian government was annualized over all shipments during the POI so that the actual amount factored into the per unit export price to U.S. customers was somewhat less than the SLA tax that was paid on any specific shipment.

Essentially, Respondents are arguing that the POI chosen to establish the export price already includes a factor to offset any countervailing duty that might have been applicable. Indeed, the parties put forth various arguments concerning whether the U.S. government had determined whether a subsidy was paid on subject merchandise and whether Canada accepted the conclusions reached in this regard. However, regardless of the merits of these arguments, the issue involved here is the calculation of export price or constructed export price for the purposes of an antidumping investigation, not a countervailing duty investigation. The scheme of the Act as it relates to antidumping involves a requirement to establish a normal value and export price of subject merchandise. In order to ensure a fair comparison, certain adjustments are prescribed in the statute. As noted above, one of the adjustments required is the deduction from the export price for any amount included in such price for export taxes, duties or other charges imposed by the exporting country (19 U.S.C. §1677(c)(2)(B)). The only exception from this requirement is that provided for in 19 U.S.C. §1677(6)(C) that *allows Commerce to deduct from the gross countervailable subsidy* an amount for export taxes specifically intended to offset the countervailable subsidy received. In this case, no countervailable subsidy was established for the

purposes of the SLA nor was the SLA tax specifically intended to offset a countervailing subsidy received.

Respondents also referred to the comparability of the SLA to Suspension Agreements. These are provided for in 19 U.S.C. §1671c(a)(b), which permits acceptance of Suspension Agreements from the government of an exporting country to eliminate or offset a countervailing subsidy or to cease exporting the subject merchandise to the United States. This provision parallels Article 18 of the World Trade Organization *Agreement on Subsidies and Countervailing Measures* and both contain a variety of provisions circumscribing the use of Undertakings or Suspension Agreements. For example, a Suspension Agreement may only be accepted in the context of an ongoing investigation, it may only be accepted following the making of a preliminary determination and an Agreement only suspends rather than terminates an investigation. Clearly, the SLA was not negotiated with a view to putting a Suspension Agreement in place, especially since the two governments could not agree on the existence of a subsidy practice. Moreover, one of the provisions of the SLA limited the United States from taking countervailing measures during the life of the Agreement.

Given the foregoing, the Panel finds that Commerce's decision concerning the calculation of export price and constructed export price is in accordance with law.

#### 4. Commerce=s Methodology for Calculating AConstructed Value Profit@ Has Not Been Adequately Explained

Where possible, Commerce calculated the Normal Value (NV) of imported softwood lumber products on the basis of home market sales prices for the corresponding Aforeign like

product@[35]. In making price-based comparisons, Commerce defined the Aforeign like product@ in accordance with 19 U.S.C. ' 1677(16)[36], and identified several different Alike products@. However, in cases where there were no home market sales of matching products, or where sales were below cost of production (COP), Commerce determined Normal Value on the basis of

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[35] The antidumping statute requires the imposition of dumping duties on Asubject merchandise@ which Ais being or is likely to be, sold in the United States at less than its fair value@, to the detriment of a domestic industry. 19 U.S.C. ' 1673. In determining whether Aless than fair value@ sales exist, Commerce is required to make a Afair comparison@ between the price charged for the subject merchandise in the United States (the AUnited States Price@) and the price charged for the corresponding Aforeign like product@ in the home market (normal value). See 19 U.S.C. ' 1677b(a). In order to make the required comparison, Commerce must identify and define the Aforeign like product@. See *SKF USA, Inc. v. United States*, 263 F.3d 1369 (Fed. Cir. 2001).

[36] 19 U.S.C. ' 1677(16) defines the term Aforeign like product@ as follows:

> The term Aforeign like product@ means merchandise in the first of the following categories in respect of which a determination . . . can satisfactorily be made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise B
>
> (I) produced in the same country and by the same person as the subject merchandise;
>
> (II) like that merchandise in component material or materials and in the purposes for which used, and
>
> (III) approximately equal in commercial value to that merchandise.
>
> ( C) Merchandise -
>
> (I) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation;
>
> (II) like that merchandise in the purposes for which used; and
>
> (III) which the administering authority determines may reasonably be compared with that merchandise.

AConstructed Value@ in accordance with 19 U.S.C. ' 1677b(a)(4). @Constructed Value@ (CV) is not an actual price at which merchandise is sold, or offered for sale. As the *Statement of Administrative Action* accompanying the *Uruguay Round Agreements Act,* P.L. 103-465, 108 Stat. 4809, makes clear, Aconstructed value serves as a proxy for a sales price@ in the country of exportation. H.R. Doc 103-316, at 839 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4175. CV is defined by statute as the sum of (1) the Atotal cost of materials and fabrication@ incurred in producing the merchandise, (2) the Acost of all containers and coverings@ and other costs incidental to placing the merchandise is condition packed ready for exportation to the United States, and (3) the Aactual amounts incurred and realized . . . for selling, general and administrative expenses, *and for profits*@ earned on home market sales in the ordinary course of trade. *See* 19 U.S.C. ' 1677b(e)(1-3).

In cases where Normal Value was determined on the basis of CV, Commerce did not attempt to calculate a separate ACV profit@ for each type of softwood lumber product being examined. Rather, Commerce calculated CV profit on the basis of profits realized on each Respondent=s aggregate home market sales of softwood lumber products, treating such aggregate sales as the Aforeign like product@. Commerce calculated CV profit by multiplying the weighted average profit rate calculated on each Respondent=s home market sales made in the ordinary course of trade by the cost of production of the like product. Commerce asserts that, in so doing, it was applying the Apreferred@ method for calculating CV profit, as set out in 19 U.S.C. ' 1677b(e)(2)(A).

Respondents assert that Commerce=s calculation of CV profit was arbitrary and unlawful, since the agency defined Aforeign like product@ for purposes of the CV profit calculation differently than for purposes of its price-based calculations of normal value. Respondents also allege that Commerce=s definition of Aforeign like product@ for purposes of the CV profit calculation is unlawful, since it is inconsistent with the statutory definition set out at 19 U.S.C. '1677(16). Commerce does not deny that it used different definitions of the term for purposes of its price-based comparisons and its CV profit computation.

The Court of Appeals for the Federal Circuit has ruled that, as a general matter, it must be presumed that Congress intended the term Aforeign like product@ to be defined the same way in different sections of the antidumping statute. However, the presumption is rebuttable. As noted in *SKF USA, Inc. v. United States,* 263 F.3d 1369, 1382 (Fed. Cir. 2001):

> In the statute Congress has used the term Aforeign like product@ in various sections and has specifically defined it in 19 U.S.C. '1677(16). We therefore presume that Congress intended that the term have the same meaning in each of the pertinent subsections of the statute and we presume that Congress intended that Commerce, in defining the term, would define it consistently. Without explanation sufficient to rebut this presumption, Commerce cannot give the term Aforeign like product@ a different definition (at least in the same proceeding) when making the price determination and in making the constructed value determination. This is particularly so because the two provisions are directed to the same calculation, namely, the computation of normal value (or its proxy, constructed value) of the subject merchandise.

*See also RHP Bearings, Inc. v. United States*, 288 F.3d 1334 (Fed. Cir. 2002)(applying the same presumption to different definitions of Aforeign like product”).

In the instant case, Commerce has provided reasons why it was necessary to define the term Aforeign like product@ differently for purposes of price based calculations of normal value and for purposes of calculating CV profit. However, Commerce has not provided an explanation sufficient to allow the Panel to determine whether the specific definition of like product” adopted by the agency in calculating CV profit in this case is reasonable and lawful. For that reason, the Panel remands this issue to Commerce, with instructions for the agency to provide a reasoned explanation of why it elected to define Aforeign like product@ for purposes of the CV profit calculation with reference to an aggregate of each Respondent=s total home market sales of softwood lumber products.

The antidumping statute contains a Apreferred@ method of calculating CV profit, and also specifies three non-hierarchical Aalternative@ methods for calculating CV profit in cases where the preferred method cannot be used.

The Apreferred@ method requires Commerce to calculate CV profit based upon:

> …the actual amounts incurred and realized by the specific exporter or producer being examined in the . . . review for . . . profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country.

19 U.S.C. ' 1677b(e)(2)(A). Significantly, the Apreferred@ method requires Commerce to determine profit amounts in connection with sales Ain the ordinary course of trade@; this requires the agency to eliminate from its calculation any sales which are made below cost, and which are thus not in the Aordinary course@ of trade.

By contrast, the three Aalternative@ methods, specified in 19 U.S.C. '1677b(e)(2)(B) are not limited to sales made in the Aordinary course@ of trade. The law providing these alternative methods states CV profit may be calculated as follows:

> (B) if actual data are not available with respect to the amounts described in subparagraph (A), then B
>
> > (I) the actual amounts incurred and realized by the specific exporter or producer being examined in the . . . review . . . for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise, that is in the same general category of products as the subject merchandise;
> >
> > (II) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the . . . review (other than the exporter or producer described in clause (I)) for . . . profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
> >
> > (III) the amounts incurred and realized for . . . profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (I)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category or products as the subject merchandise . . . .

It is to be expected that Respondents in an antidumping investigation might prefer the use of the alternative methods of determining CV profit, particularly those set out in 19 U.S.C. '1677b(e)(2)(B)(I) and (III), since those methods do not require the exclusion from consideration of sales which are not in the Aordinary course of trade@. In this case, Respondents assert that, had Commerce applied the same definition of Aforeign like

product@ to CV profit as it applied to the determination of price-based Normal Value, it would have to conclude that, for sales subject to CV analysis, there were no home market sales in the Aordinary course of trade@ and the CV profit could not be determined using the Apreferred@ method of 19 U.S.C. ' 1677b(e)(2)(A). Presumably, these alternative methods would yield a lower CV profit, a lower CV, and lower margins of less than fair value sales.

As noted above, the Federal Circuit=s *SKF* decision holds that, absent a reasoned explanation, Commerce=s application of two different interpretations to the term Aforeign like product@ in the context of a single antidumping calculation is presumably arbitrary and unlawful. *See also Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996). Aware of the Federal Circuit=s *SKF* decision, issued shortly before the publication of the final determination at issue in this case, Commerce sought in its determination to explain its decision to use different definitions of Aforeign like product@:

> The SAA establishes a general rule or preferred methodology for calculating the amounts for SG&A and profits in the CV calculation. For the preferred methodology to be applicable, there must be sales of a foreign like product in the ordinary course of trade (i.e., sales made at prices above cost). However, the statute and SAA also establish when normal value is to be based upon CV, stating that Aonly if there are no above cost sales in the ordinary course of trade in the foreign market under consideration will Commerce resort to constructed value. Thus, if the Department were required to interpret and apply the term Aforeign like product@ in precisely the same manner in the CV profit context as in the price context there would be no sales of foreign like product on which to base the CV profit calculation. Accordingly, the preferred method of calculating CV profit established by Congress would become an inoperative provision of the statute. *Final Determination*, Comment 6.

This statement does explain why the term Aforeign like product@ need not be interpreted identically for purposes of price-based calculation and for purposes of determining CV profit. Indeed, in *RHP Bearings Ltd. et al. v. United States,* 2003 Ct. Intl. Trade LEXIS 11, Slip Op. 03-10 (January 28, 2003), the United States Court of International Trade, evaluating a Commerce remand determination addressed to this issue rendered in the context of an antidumping proceeding involving bearings, held that a similar explanation by Commerce provided Asufficient explanation to rebut the presumption that Commerce cannot use differing definitions for an identical term in the same proceeding@, and held that ACommerce adequately explained why the differing use of the same term is necessary to establish NV and CV profit in the same antidumping proceeding@. In similar fashion, the explanation appearing at Comment 6 of the IDM in this case is sufficient, in the Panel=s view, to rebut the presumption that the term Aforeign like product@ must be given an identical definition wherever it appears in the antidumping statute.

Recently, in *FAG Kugelfischer Georg Schafer AG et al. v. United States*, 2003 U.S. App. LEXIS 11607, No. 02-1500, -1538 (June 11, 2003), the Court of Appeals for the Federal Circuit ruled that a decision by Commerce to calculate CV profit based upon the Apreferred@ basis set out in 19 U.S.C. '1677b(e)(2)(A) was reasonable and not overbroad, in connection with an antidumping review of certain antifriction bearings. The Circuit court there ruled:

> Section 1677(16) . . . offers three alternative definitions for foreign like product, which increase in the scope of products that may be included. See 19 U.S.C. '1677(16). The first available category, with which differing determinations may satisfactorily be made, is to be applied. *Id.* There is no restriction that Commerce use just one subsection per proceeding. *Id.* Accordingly, we believe that

> Commerce reasonably explained that the determinations for the variables at issue require different sets of foreign like product data. The bearing market, with its wide disparity in products, necessitates that direct price comparisons be done on a model-by-model basis. Therefore, the use of price comparisons requires the identical model and product family data of sections 1677(A) and (B). And CV profit may be based on a broader scope of products because use of aggregate data, as described in section 1677(16)(C), results in a practical measure of profit that can be applied consistently and with administrative ease over the range of included products. The Federal Circuit also rejected the notion that Commerce must work its way through the hierarchy of definitions set out in 19 U.S.C. ' 1677(16), a methodology which would allow the agency to take below-cost or non-contemporaneous sales into consideration. AThis logic fails, however, because calculating constructed value under section 1677b(e)(2)(A) requires that the sales of foreign like product occur within the ordinary course of trade. And the definition of ordinary course of trade requires that the sales used must not be below cost, *id.*, ' 1677b(b)(1)(disregarding below cost sales that meet the requirements of subsections (A) and (B)), and must be contemporaneous to the exportation of the subject merchandise, *see id.* ' 1677(15).@

*FAG Kugelfischer Georg Schafer AG, supra*, at 9.

Thus, Commerce=s decision to define Alike product@ for purposes of calculating CV profit on the basis of the definition set out at 19 U.S.C. ' 1677b(e)(2)(A) is neither unlawful, nor based on incorrect methodology. That does not end the inquiry, however. That Commerce need not define the term Aforeign like product@ identically in all phases of an antidumping determination does not establish that the particular definition applied in this case in determining CV profit B defining each Respondent=s aggregate home market sales of as sales of a Aforeign like product@ B is reasonable. Indeed, the Final Determination in this case merely asserted that:

> In [*RHP Bearings, Inc. v. United States*, 2001 Ct. Intl. Trade LEXIS 109, Slip Op. 01-106 (2001)], the CIT

> affirmed the Department=s calculation of CV profit of the class or kind of merchandise, which encompassed all foreign like products under consideration, because the use of such data matched the criteria of section 771(16)( C) of the Act (i.e., the same general class or kind of merchandise). We believe a method based on varied groupings of foreign like products, each defined by a minimum set of matching criteria shared with a particular model of the subject merchandise, would add an additional layer of complexity and uncertainty to the antidumping proceedings without generating more accurate results.

*IDM,* Comment 6.

However, the CIT determination in *RHP Bearings*, on which the *Final Determination* relies, was vacated by the Court of Appeals for the Federal Circuit, and remanded to Commerce for a more complete explanation of Commerce=s CV profit methodology. *RHP Bearings, Inc. v. United States*, 288 F.3d 1334 (2002). In particular, the Federal Circuit vacated the lower court=s decision completely, including its decision with respect to Commerce=s finding in that case that Athe use of aggregate data results in a reasonable and practical measure of profit that we can apply consistently in each case@. Following remand proceedings, the CIT upheld Commerce=s remand determination not only because it found that a satisfactory explanation had been provided for the agency=s decision to apply different definitions to the term Aforeign like product@, but also based upon Commerce=s description of the Afactual background of its calculations@, and Commerce=s own admission in that case that the use of different definitions will depend on the specific facts of each case. ACommerce further explains that differing categories of merchandise can satisfy the meaning of the term Aforeign like product@, *depending on the specific facts of each antidumping proceeding . . .*@. *RHP Bearings Ltd v. United States*,

Slip Op. 03-10, at p. 11 (emphasis added). The Panel does not have the benefit of a similar explanation of the factual background of Commerce=s decision in this case.

While the courts have held that Alike product@ can be defined differently in the NV and "CV profit" contexts, the courts have not upheld a blanket rule that the use of a Respondent=s aggregate home market sales for calculating CV profit will be an acceptable method in all cases. While the *Final Determination* asserts that the use of a model-match comparison in determining CV profit Awould add an additional layer of complexity and uncertainty to antidumping proceedings without generating more accurate results@, Commerce furnishes no explanation for this assertion. Had Congress intended that Commerce exclusively determine CV profit on the basis of a Respondent=s total aggregate sales, it would have so provided in the statute. Indeed, certain Respondents have suggested that the use of such an aggregate may frustrate the antidumping law=s goals of a fair Aapples-to-apples@ comparison in the case of softwood lumber products, since certain products are generally sold at low or no profit, and the application of an aggregate CV profit calculation might artificially create or inflate LTFV margins[37]. Absent Commerce=s explanation of why the use of the aggregate method in this case is appropriate, and not arbitrary, the Panel is not in a position to decide whether the agency's specific definition of "like product" is reasonable. That the method used is

[37] Indeed, by defining the "like product" for CV profit purposes as each Respondent's total sales of subject merchandise, Commerce creates the possibility that two producers of identical products might have their CV profit calculated on the basis of vastly different transactions. Such Respondents might be engaged in sales of different "product mixes", and their above-cost sales may be of products which have little relation to each other, or to the product for which an LTFV margin is being calculated.

administratively convenient does not demonstrate that it represents a reasonable interpretation and application of the statute.

Accordingly, the Panel remands this issue to Commerce with directions that the agency provide an explanation of why, in this case, the agency=s decision to define Aforeign like product@ for purposes of calculating CV profit as each Respondent=s aggregate sales of subject merchandise is reasonable and in accordance with law.

### 5. Commerce Erred in Failing to Take Dimensional Differences <u>Into Account in Allocating Joint Costs</u>

Respondents contend that Commerce, in its *Final Determination*, used an improper methodology for allocating joint production costs. Respondents contend, specifically, that the appropriate method for allocating joint production costs must be sensitive to value differences associated with particular product characteristics. Commerce used value-based cost allocations for different grades of lumber, but relied on average-cost allocations for different lumber dimensions. As a result, within a particular grade, lumber products that differed by thickness, width and/or length were all assigned identical production costs on a volumetric (million board feet or MBF) basis. Commerce's failure to allocate joint production costs on the basis of relative values corresponding to dimensional differences resulted in a variety of alleged distortions in crucial calculations, including the below-cost test, the price-to-price comparisons that Commerce allowed, DIFMER adjustments and the CV calculation.[38] These distortions

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[38] Commerce's DIFMER adjustments and CV calculation will be addressed in other sections of the Panel's decision.

resulted in a cost allocation that did not "reasonably reflect the costs associated with the production and sale" of individual products.[39]

To support their contention, Respondents argue that because all softwood lumber products are processed jointly and indistinguishably, it is impossible to differentiate between different thicknesses, widths, lengths, and grades of lumber until the end of the sawmill process. As a result, the costs of stumpage, harvesting, hauling, storing, debarking and sawing whole logs are not directly traceable to particular lumber products. Thus, the entire logging and sawmill operation is a quintessential example of joint production.

Respondents further argue that size affects price. All parties advocated the inclusion of width, thickness and length among the product characteristics that Commerce should rely on in order to match U.S. and home market products for price comparisons. Commerce agreed and included those criteria.

Commerce responds that it only departed from the companies' normal records for the calculation of log and saw mill costs, which are joint costs associated with wood grades. Commerce stated that it relied on the normal books and records for all other costs, as required by statute. Since there are no measurable differences in the inputs used or the processing required to produce lumber of various dimensions within each grade, Commerce claims it is reasonable to conclude that there are no actual cost differences associated with dimension. Thus, it was reasonable for Commerce to limit the value-based cost allocation to grades.

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[39] *See,* 19 U.S.C. §1677b (f)(1)(A).

Commerce also argues that while the differing grade bands are inherent in the log, the differing dimensions into which the log is cut are controlled almost entirely by management. This results in each mill shifting production to the dimensions that are commanding higher prices, which creates extra supply that fills any shortages and then brings down prices. Commerce contends costs associated with dimension should not be allocated based on sales prices. Further, Commerce argues, pricing patterns of specific lumber dimensions do not follow a reliable pattern to justify the use of dimensional prices to allocate costs. In fact, the relationships between dimensions vary significantly between companies.

The antidumping law requires that Commerce calculate costs "based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise."[40] Where a Respondent's books and records do not meet these criteria, Commerce must employ an alternative method to calculate costs. In this case, Commerce determined that the average joint costs used by Respondents in their accounting records did not reasonably reflect the production costs of the individual products under investigation. As a result, Commerce devised a methodology by which it used a value-based methodology for allocating joint wood and sawmill costs between different grades of lumber. Commerce, however, continued to use a volume-based average cost methodology to allocate joint costs between different sizes of lumber within a particular

[40] 19 U.S.C. §1677b(f)(1)(A).

grade. The Panel holds that Commerce erred by failing to use the same value-based methodology to allocate joint costs between different sizes of lumber as well.

The Panel is aware of the deference to be accorded to Commerce's determinations on the methodologies to be utilized in cost allocation determinations; however, the methodologies selected must be sufficiently reasonable.[41] The logic of applying a value-based cost allocation to joint products is as compelling with respect to dimensional differences as it is with respect to grade differences: (1) the products are produced simultaneously through a joint production process and (2) the products produced have significantly different values. Although Commerce argues in its brief that softwood lumber of varying dimensions do not meet the criteria of "joint products"[42], Commerce acknowledged in its *Final Determination* that "lumber production is the result of a joint production process"[43] and that downstream processing (e.g., planing, kiln drying) marks the point where the process is moved outside of a joint product scenario.[44] As described by the parties, the production process for lumber is such that various sizes and grades of lumber are all produced simultaneously; a single input goes in to the production process and multiple products come out[45] - a quintessential example of a joint production process.

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41 *Thai Pineapple Public Co., Ltd. v. United States*, 187 F.3d 1362, 1368-69 (Fed. Cir. 1999)

42 *See, Commerce Brief* at Vol. I, p. 40.

43 IDM at Comment 4.

44 *Id.*

45 *See, Respondents Joint Brief* at Vol. I, p. 43; *see also Commerce Brief* at Vol. I, p. 31 ("In the production of softwood lumber products, two or more products are jointly produced simultaneously from one input, i.e., a log.").

Whether or not the mix of various lumber products produced result from management decision, the economics of joint production remain the same. This mix is likely to include products of varying values whether determined intrinsically (such as maximum lengths set by the size of the log) or by design. Production is rational so long as total joint production costs are recovered through sales of the total mix of joint products produced. Disregarding value differences in joint products will necessarily result in some products displaying extraordinarily high profit margins and other products low (or negative) profit margins. A finding of less than fair value sales is an almost inevitable methodological artifact of a value-insensitive cost allocation approach.

Any cost allocation method applied to joint products has an element of arbitrariness. In the end, what are of economic substance in joint products (in making production decisions) are total costs. So long as total production costs are recovered (through the sale of the various joint products) it is arguable whether a finding of below cost sales (for dumping purposes) is warranted. A value-insensitive cost allocation methodology that mechanically generates significant below-cost sales on some joint products and extraordinary high-profit sales on others cannot be said to be reasonable.

With regard to the second criteria for the use of value-based cost, Commerce argues that the price differences between lumber dimensions do not provide a reliable and consistent pattern to show that there are distinct differences between the inherent values of the products. Commerce's argument is somewhat surprising in light of the fact that Commerce included price differences between dimensions in the product matching

criteria. Regardless, there is at least some data to suggest that dimension matters.[46] Ignoring this data necessarily introduces distortions into the calculations.[47]

The Panel holds that disregarding value differences corresponding to dimensional distinctions for purposes of cost allocation is unreasonable and remands this determination to Commerce with instructions to apply a value-based allocation methodology to make cost allocations in respect of dimension as well as grade.

### 6. Commerce Erred in Failing to Make An Adjustment to Account for Dimensional Differences in the Merchandise Being Compared

Respondents argue that the antidumping law (19 U.S.C. 1677b(a)(6)(c)(ii))[48] requires that Commerce calculate a "difference in merchandise" (DIFMER) adjustment when comparing prices of products that differ in physical characteristics. In this instance, the agency did not calculate a DIFMER adjustment for grade or dimension differences in its *Preliminary Determination*. However, in the *Final Determination*, as a result of having made a value based cost allocation for wood and sawmill costs, Commerce made a DIFMER adjustment for differences in grade, but determined that no DIFMER

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[46] *See, e.g., Respondents' Joint Brief* at 44-47.

[47] Commerce's argument that it does account for price and cost differences in dimension is misleading. Commerce is allocating cost on a per unit basis, thus, the same total cost would not be allocated to lumber with different dimensions. However, within the same grade, the same per unit cost is allocated to every product regardless of dimension, and without regard to the different value inherent in products of different dimensions.

[48] 19 U.S.C. §1677(a)(6)(c)(ii) provides that normal value shall be (C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the (foreign market ) price (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to – (ii) the fact that (non-identical merchandise) is used to determine normal value.

adjustment for dimension was appropriate since the record did not establish that there were differences in cost or value attributable to differences in dimension.[49]

There is no disagreement between the parties that lumber size has an impact on price and that physical differences can result in different market values. In this context, Respondents point to the parallel between this and the cost allocation issue discussed above, but stress that the DIFMER issue is narrower as it is comparison specific, i.e. it relates only to a determination of whether a difference in price is in whole or in part due to physical differences in the products compared. They argue that if there is a price difference due to physical characteristics, Commerce must make a DIFMER adjustment. They claim that in accordance with 19 U.S.C. §1677-1(a)(2) and 19 C.F.R. §351.413, the agency can only disregard such an adjustment as being insignificant if its impact on the dumping margin is less than 0.33 percent and that it cannot ignore below cost sales in the home market data base in calculating DIFMER adjustments. Respondents maintain the record demonstrates that (a) there are significant price differences between all similar product comparisons used, (b) there is no alternative explanation for the price differences other than differences in size and (c) there is no analysis by Commerce with respect to specific product comparisons.[50]

Commerce explained that when it does not have identical home market sales within the ordinary course of trade, normal value is based on sales of the most similar product adjusted for physical differences if the amount of any price difference

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[49] *See, Commerce Brief* at Vol. I, p. 59.

[50] *See, Respondents' Joint Brief* at p. 43.

attributable to such physical differences has been established to its satisfaction. The agency notes that, while the statute grants it discretion to determine a suitable method to calculate a DIFMER, it has rarely been able to determine the direct price effect of differences in distinct physical characteristics of merchandise. As a result, the preferred method adopted is to base allowances almost exclusively on the differences in variable costs of manufacturing between the products compared. Commerce has found that the result achieved by this methodology approximates the effect that such differences have in products. However, it retained, as an option, the use of market value where appropriate.[51]

Petitioners argued that a DIFMER adjustment was made for all price-to-price matches involving non-identical merchandise and, where Commerce found no difference in variable costs between the products, the adjustment equaled zero. Petitioners take the position that while Commerce may calculate value-based DIFMERS, it is not required to do this when cost-based adjustments are possible. In this instance, they maintain that the agency calculated cost-based adjustments that equaled zero.[52]

The issue before the Panel is whether or not Commerce should have made an adjustment for dimension differences and, if so, whether there was sufficient information on the record to establish to its satisfaction that the price differences between the goods compared were attributable to different physical characteristics. There is no dispute between the parties that 19 U.S.C. §1677b(a)(6)(c)(ii) provides for an adjustment to normal value for differences in physical characteristics between the products being compared. The governing regulation, 19 C.F.R.§351.411(a) also makes clear that while

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[51] IDM at Comment 8.

[52] *See, Petitioner's Response* Brief at p. 44-46.

the Secretary has discretion to the extent that he "may" determine that the merchandise sold in the United States does not have the same physical characteristics as the merchandise sold in the foreign market, and that the difference has an effect on price, the Panel considers that the use of the word "*will*" in the last sentence of this subsection of the regulation imposes an obligation to grant a reasonable allowance when the physical differences between compared products has an effect on prices [53]. (Emphasis added) The record indicates Commerce recognized that dimension could result in differences in market value but it did not grant an allowance for dimensional differences because it determined that, since it could not use home market sales that were below cost of production, there was no information on the record to enable it to make a DIFMER calculation.[54]

The law requires that a fair comparison be made between the United States price and the foreign market price adjusted to account for physical differences when similar products are compared. In this case, Commerce stated that it did not have a cost basis for calculating a DIFMER adjustment. However, the record contains a considerable amount of data and charts concerning market prices for these products in Canada. In this connection, the agency noted that to the extent that it compared products having different dimensions, the differences were small, prices fluctuated in relation to each other during

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[53] 19 C.F.R. §351.411 provides that "in comparing United States sales with foreign market sales, the Secretary may determine that the merchandise sold in the United States does not have the same physical characteristics as the merchandise sold in the foreign market, and that the difference has an effect on prices. In calculating the normal value, the Secretary will make a reasonable allowance for such differences". 19 C.F.R. §351.411(b) defines *reasonable allowance:* "In deciding what is reasonable allowance for differences in physical characteristics, the Secretary will consider only differences in variable costs associated with the physical differences. Where appropriate, the Secretary may also consider differences in the market value."

[54] IDM at Comment 8.

the POI and there appeared to be little, if any, difference in home market prices that was attributable to differences in dimensions of the products compared, especially where dimensional differences were minor.[55]

It is relevant to note that while Commerce obviously made some price comparisons, it did not indicate that it had not been provided with sufficient data to enable it to establish to its satisfaction that price differences were attributable to physical differences. As well, it would be unreasonable for the agency to require constant prices or price consistency for and between products in a dynamic commercial market. Moreover, there does not appear to be any evidence on the record to substantiate the agency's judgment concerning the effects of dimension on market values and prices. While 19 U.S.C. §1677f-1(a)(2) provides discretion to the administering authority to "decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise", the record does not provide an analysis to support the conclusion that "there is little, if any, difference in home market prices that is attributable to dimension."

In determining that no value-based DIFMER could be calculated, Commerce decided that it would be inappropriate to use the Respondents' home market prices where there were home market sales of certain products outside the ordinary course of trade, i.e. sales below cost of production during the POI. The logic of this approach, as stated by the agency, is that to do so would result in adjusting normal values for the similar merchandise back to the prices for the like merchandise that had already been determined

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[55] IDM at Comment 8.

to be outside the ordinary course of trade.[56] While the law may require the agency to disregard below cost sales for the purpose of calculating constructed value, the Panel does not accept that they should be disregarded when comparing similar merchandise for the sole purpose of establishing market value differentials due to physical differences.

In this instance, the objective in comparing Canadian domestic sales of the like product sold to the United States and Canadian sales of a similar product is to measure the market value of the differences between two physically different products. Clearly, the market will normally attach a different value to two pieces of lumber, one measuring 2x4x8' and the other 2x4x16'. The only issue here is how to measure the price difference or ratio that the market is prepared to pay for one size over the other.

Under normal circumstances, producers' selling price patterns, over a given period of time should reflect the market price differentials between the various sizes and grades of lumber. Mathematically it follows that, all other things being equal, if a producer's Canadian price of the like product is below the cost of production, adjusting a profitable Canadian price for a similar product used for comparison purposes by the ratio between these two selling prices would result in a figure that is below the cost of production for the similar product. However, when the similar product is sold in various dimensions in Canada at a profit, it should be possible to establish a dimension *differential* that would reflect the relative market price for various sizes of the like and similar products. For example, if SPF 2x4x8' lumber sells for $10.00 and SPF 2x4x16 sells at a profitable figure of 25.00, the cost per foot for the two would be $1.25 and $1.56 respectively; that is, a normal value of $12.48 for an 8 foot length rather than

[56] IDM at Comment 8.

$10.00. Another possible approach might be to establish average Canadian market prices for similar products based on the selling prices of *all* producers in the Canadian market and establish price ratios between the different dimensions for use in calculating DIFMERs for the similar products being compared to the goods sold to the United States.

With regard to Petitioner's contention, at the hearing its counsel noted that because home market prices were judged unreliable, the variable costs of production for the products concerned were entered into the agency's computer program and the mechanical result that emerged for some of the products was a DIFMER equal to zero.[57] The Panel notes that Commerce has not claimed that it calculated a DIFMER for dimension but did state categorically "there was no basis for calculating a DIFMER for dimensions based on value or cost."[58] Given the circumstances, the Panel cannot accept that a DIFMER was calculated when the agency itself declares that it was not.

The Panel concurs with Respondents that the law requires that a DIFMER adjustment be made where similar products are compared in the establishment of normal values based on record data relating to pricing of similar merchandise in Canada. Accordingly, this matter is remanded to Commerce for the calculation of a DIFMER for dimension.

### 7. Commerce Did Not Err in Employing a Practice of "Zeroing" When Determining Weighted Average Margins of Dumping

[57] *See,* Tr. at Vol. II, p 243-244.

[58] IDM at Comment 8.

The Respondents contend that Commerce's practice of "zeroing" is contrary to law. "Zeroing" involves the disregarding of the quantum by which export price (or its equivalent) exceeds normal value for certain products under investigation – these products display so-called "negative dumping margins." In determining the weighted-average dumping margin across all products under investigation, Commerce sets the dumping margin at zero for each product with a negative dumping margin. The resultant weighted-average dumping margin is greater than would be the case were the amount of "negative dumping margins" included in the calculation.

Respondents argue that zeroing creates artificial margins by resetting all negative margins to zero and that to make a fair comparison, these differences should be part of the averaging. A "fair comparison", Respondents continue, is required to be made "between the export price or constructed export price and normal value" under U.S. law, as amended by the Uruguay Round Agreements Act (URAA).[59] According to Respondents, for the comparisons to be fair, they must include all the weight-averaged values.[60]

Further, Respondents argue that the practice of zeroing is illegal under international law. To support their claim, Respondents cite the report of the WTO Appellate Body in *European Communities – Bed Linen from India*,[61] ("*EC-Bed Linens*")

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59 *See,* 19 U.S.C. § 1677b(a).

60 To support their argument, Respondents cite *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade 1996), a case in which the court stated that the practice of zeroing does not produce an "apples-to-apples" comparison. *Id.* at 1150. However, the court in that case still allowed the methodology to stand. Respondents argue that the reasons articulated by the court no longer apply under the current law.

61 WT/DS141/AB/R (Mar. 1, 2001).

as establishing that the practice of zeroing is inconsistent with the WTO Antidumping Agreement.

Commerce responds that the statute directs Commerce to calculate the weighted average dumping margin for each Respondent and to consider "the percentage determined by dividing the aggregate dumping margins determined … by the aggregate export prices and constructed export prices …"[62] Nowhere, Commerce contends, is the agency directed to include the amount by which sales are above fair value; indeed that would contravene the explicit terms of the statute. Although the statute is silent on how to account for non-dumped sales for purposes of calculating a dumping margin, Commerce continues, the United States Court of International Trade has upheld the practice as reasonable and legitimate.[63] Further, argues Commerce, including negative margins in its margin analysis would cancel out margins on dumped sales, effectively eviscerating the purpose of Commerce's antidumping efforts. The agency also contends that the *EC Bed Linens* report does not provide support for Respondents' case as *EC Bed Linens* did not comment on U.S. practices.

Recently, the Court of International Trade found that the statute, as amended by the URAA, "is silent as to the impact of negative margins" and the "statute neither

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[62] *Commerce Brief* at Vol. I, p. 88, (*citing* 19 U.S.C.A. §1677(35)(B)(2002)).

[63] *Id.* at 89 (*citing* Timken *Co. v. United States*, 240 F. Supp. 2d 1228 (Ct. Int'l Trade 2002); *Bowe Passat*, 926 F. Supp. at 1149-50; *Serampore Indus. Pvt. Ltd. V. United States,* 675 F. Supp. 1354, 1360 (Ct. Int'l Trade 1987)).

requires nor prohibits Commerce from considering nondumped sales."[64] Applying the deference accorded under *Chevron*,[65] the Court upheld Commerce's practice of zeroing.

The post-URAA statute defines dumping margin as "the amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise."[66] Weighted average dumping margin is defined as "the percentage determined by dividing the aggregate *dumping margins* determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."[67] Commerce interprets these two sections as directing it to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. Therefore, Commerce, in calculating the dumping rate, included dumped and non-dumped sales in the denominator, but only dumped sales in the numerator.

Respondents' main argument -- that the URAA amended U.S. law such that it requires a fair comparison be made between the export price or constructed export price and normal value which, in turn, requires that all the weight-averaged values must be included in the dumping margin calculation -- is not persuasive. The language "fair

64 *Corus Staal BV v. United States*, 2003 Ct. Intl. Trade LEXIS 24 at 20, Slip Op. 03-25 (Ct. Int'l Trade March 7, 2003). The court also found that the WTO Antidumping Agreement does not clearly prohibit zeroing. *Id.* at 25-26.

65 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)(requiring reviewing courts to defer to an agency's reasonable interpretation of an ambiguous statute).

66 19 U.S.C. § 1677(35)(A)(emphasis added).

67 19 U.S.C. § 1677(35)(B)(emphasis added).

comparison" is used in 19 U.S.C. § 1677b(a) in the context of comparing export price or constructed export price and normal value in determining whether subject merchandise is being sold at less than fair value; it is not used in the statutory language for calculating a dumping margin. Further, Respondents do not provide persuasive evidence for their leap in reasoning that a "fair comparison" requires that the dumping margin calculation include all the weight-averaged values. While the Tariff Act of 1930 clearly has undergone substantial modifications by virtue of the URAA, this Panel does not find in it a clear prohibition of zeroing. The obligation to make a "fair comparison" contained at 19 U.S.C. 1677b does not seem to be a general source for attack against all practices in an antidumping investigation that arguably have a distorting effect.

Respondents' argument that zeroing is inconsistent with the WTO Antidumping Agreement also is unpersuasive. The *EC-Bed Linens* report can at most be merely suggestive that Commerce's practices are in conflict with WTO Antidumping Agreement obligations.[68] WTO decisions are not binding upon Commerce or on this Panel.

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[68] The WTO Appellate Body has not yet addressed the consistency of the Department's use of zeroing. *See United States – Certain Measures Regarding Anti-Dumping Methodology*, Request for Consultations by Brazil, WT/DS239/1 (Sept. 21, 2001). In the absence of a report by the WTO Appellate Body examining the Department's zeroing practices any conclusion of inconsistency with the United States' various WTO obligations is speculative. Even were the WTO Appellate Body to find the Department's zeroing practices to be inconsistent with the WTO Antidumping Agreement, such a report would not be directly controlling on a U.S. reviewing court nor on this panel. The Court of International Trade has held that WTO Panel and Appellate Body decisions are non-binding. *The Timken Co. v. United States*, 240 F. Supp. 2d 1228 (Ct. Int'l Trade 2002) (citing *Hyundai Elec. Co., Ltd. v. United States*, 53 F. Supp. 2d 1334, 1343 (1999)). A clear finding of inconsistency of the Department's practice of zeroing with the United States' WTO Antidumping Agreement obligations would, however, implicate the *Charming Betsy* doctrine. *Charming Betsy* is a federal common law principle of statutory interpretation. *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ."); *see also* Restatement (Third) of Foreign Relations Law 114 (1987). In the case of statutory ambiguity, *Charming Betsy* requires the rejection of an otherwise permissible interpretation if that interpretation conflicts with an international treaty obligation of the United States. Were the Department's practice of zeroing (in distinction to the European Communities' practice of zeroing) found to be inconsistent with the WTO Antidumping Agreement, application of the *Charming Betsy* doctrine might well constrain this panel to find the

The Panel finds that Commerce's practice of zeroing is a permissible application of the statute – one which has been upheld by various reviewing courts[69] -- and therefore is affirmed.

## B. COMPANY-SPECIFIC ISSUES

### 1. Commerce's Decision to Treat Abitibi-Consolidated Inc. and its Affiliate, Scieries Saguenay Ltee. As a Single Producer is Unsupported by Substantial Evidence on the Record.

Respondent Abitibi asserts that the determination by Commerce to treat Scieries Saguenay Ltée ("SSL") and Abitibi as one producer is not in accordance with law and not supported by substantial evidence. In the result, Abitibi is seeking to remove SSL from the scope of the dumping margin found for Abitibi (12.44%) to the "all others" rate of 8.43%.

Abitibi owns fifty (50) percent of the outstanding shares of SSL and has the right to appoint two directors of SSL's supervisory board of four directors who meet once a year to approve the prior year's financial statements and the budget for the current year. Abitibi also has the right to appoint a vice-president of SSL, and receives monthly financial statements (balance sheet, income statement, and cash-flow statement). Abitibi purchases wood chips from SSL and dries and planes some of SSL's lumber production

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Department's practice unreasonable and therefore contrary to law. However, in the absence of a clear and authoritative determination that the Department's practice of zeroing is inconsistent with the United States' WTO obligations or other international legal commitments, this panel has no basis to reject the Department's interpretation via the *Charming Betsy* doctrine.

[69] *See, Bowe Passat*, 926 F. Supp. 1138 (Ct. Int'l Trade 1996); *The Timken Co.,* 240 F. Supp. 2d 1228 (Ct. Int'l Trade 2002).

on a contract basis. No lumber produced by SSL is sold through or by Abitibi, nor is any lumber produced by Abitibi sold through or by SSL. Abitibi is not provided with information about SSL's customers, prices for individual products or product mix. SSL does not consult with Abitibi regarding products, customers or prices.[70] During the POI, Abitibi's Senior Vice-President, Woodlands and Sawmills, was a vice president of SSL. He submitted a declaration on the administrative record stating that:

> ... he did not even know he had this title until the issue arose in the context of this antidumping proceeding. He stated that he had no management responsibilities at SSL, that no employees of SSL reported to him, and that he received no remuneration of any kind from SSL. His only role at SSL was to monitor its overall financial performance so as to safeguard Abitibi's investment.[71]

The evidence is not challenged.

Abitibi notes that the antidumping statute contains no provision expressly authorizing Commerce to disregard the separate legal existence of distinct companies, or to collapse multiple companies. To the contrary, asserts Abitibi, the statute requires Commerce to compute a margin of dumping for each individual exporter or producer it investigates, i.e., each separate legal entity. In support of its position, Abitibi reviews certain judicial discussions of the issue in the context of antidumping law, and challenges the validity of 19 C.F.R. §351.401(f) that sets out the policy of Commerce. As well, Abitibi refers to the common law with regard to the treatment of separate legal entities,

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70 See *Abitibi brief* at p. 44 ff., referring to the Declaration of Louis Marie Bouchard. The accuracy of Abitibi's assertions was not disputed.

71 *Id.* at 45-46 (referring to the Bouchard Declaration at ¶¶ 1, 9).

and concludes its arguments with the assertion that, in any event, Commerce has failed to apply its own criteria properly. These contentions will be dealt with below.

Commerce responds essentially as follows: [72]

> The Department has a long-standing practice whereby it treats two or more affiliated producers as one entity if it is shown that those companies have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and there is a significant potential for the manipulation of price and/or production. *See Koenig & Bauer-Albert AG, et al. v. United States*, 90 F. Supp. 2d 1284, 1288 (Ct. Int'l Trade 2000) ("*Koenig & Bauer*") (*citing Certain Pasta From Italy*, 61 Fed. Reg. 30,326, 30,351 (Dep't of Commerce 1996) (final determ.); *Certain Hot-Rolled Carbon Steel Products from Canada*, 58 Fed. Reg. 37,099, 37,107 (Dep't of Commerce 1993) (final determ.); *Certain Granite Products from Spain*, 53 Fed. Reg. 24,335, 24,337 (Dep't of Commerce 1988) (final determ.). When these factors are met the Department "collapses" these producers into one entity and assigns them a single dumping margin. id. This collapsing practice helps to "ensure that {the Department} reviews the entire producer or reseller, not merely a part of it." *Queen's Flowers De Colombia, et. al. v. United States*, 981 F. Supp. 617, 622 (Ct. Int'l Trade 1997) ("*Flowers De Colombia*"). Most importantly, by treating as one entity affiliated companies that could produce the same product and are under sufficient common control such that price and/or production could be manipulated, the Department is able to more effectively fulfill one of its basic responsibilities, preventing evasion of the Antidumping Law. *Flowers De Columbia*, 981 F. Supp. at 622.
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> The Department has established a detailed collapsing test in its regulations. 19 C.F.R. 351.401(f). In order to collapse two producers, the Department must first find that they are affiliated. 19 C.F.R. 351.401(f). "Affiliated" is defined within the Act and includes, *inter alia*, a company that owns more than 5 percent of the voting stock or shares of another company. 19 U.S.C. § 1677(33). In the instant investigation it was uncontested that Abitibi owned 50 percent of SSL's stock. *Abitibi Brief* at pg. 60. Therefore, the Department properly found that Abitibi and SSL were affiliated.
>
> Next the Department had to determine whether Abitibi and SSL had ". . . production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure

[72] *Commerce Response Brief*, Vol. III, p. 5-7.

> manufacturing priorities." 19 C.F.R. 351.401(f)(1). The Department found that both companies produced softwood lumber products falling within the scope of the investigation and, as such, the Department properly determined that both companies produced identical or similar products that would not require substantial retooling of either facility in order to restructure manufacturing priorities. *Memorandum Re: Collapsing of Respondent Abitibi Consolidated Inc with Scieries Saguenay Ltee. from Amber Musser to Bernard T. Carreau* PR Doc. 467 (July 18, 2001). ("*Abitibi Collapsing Memo*")
>
> Finally, under the Department's collapsing test, the Department must determine whether there is a significant potential for the manipulation of price and/or production. 19 C.F.R. 351.401(f)(2). The factors that the Department will analyze include (1) the level of common ownership, (2) the extent to which managerial employees sit on the board of directors of an affiliated firm, and (3) whether operations between the two companies are intertwined. 19 C.F.R. 351.401(f)(2). During the instant investigation the Department analyzed all of these factors and found that based on a totality of these factors a significant potential for the manipulation of price and/or production existed. *Abitibi Collapsing Memo* PR Doc. 467.

Commerce defends the regulation, citing the deference standard set out in *Chevron* and *Koyo Seiko*[73], and approvals by the Court of International Trade of the collapsing practice.[74] While acknowledging that the statute does not specifically deal with collapsing, Commerce argues that it has the responsibility to administer the statute to effectuate the purpose of the law which includes prevention of circumvention. Accordingly, argues Commerce, it has the authority to determine when affiliated entities may be considered a single producer for the purpose of calculating a dumping margin.

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[73] *See, Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Koyo Seiko Co., Ltd. v. United States*, 258 F.3d 1347 (Fed. Cir. 2001).

[74] *See, Commerce Brief* at Vol. III, p. 11ff.

Supporting Commerce, Petitioners argue that the statute "leaves it to the agency to determine whether more than a single entity is the producer for the margin calculation."[75] With regard to the regulation, Petitioners note that during the notice and comment period, no one advanced the notion that the agency lacks authority to treat affiliated entities as a single entity for the purpose of margin calculation where sufficient intertwining created a significant potential for one company to manipulate the margin calculation.[76] Moreover, Petitioners argue, common-law rules regarding separate corporate entities are not determinative in the context of the antidumping law. Finally, Petitioners submit, Commerce properly exercised its judgment to find a significant potential for manipulation and therefore acted reasonably in determining to treat Abitibi and SSL as a single entity for margin calculation.

In reply, Abitibi emphasizes the "bedrock principle of U.S. law" that recognizes the separate legal existence of corporations.[77] Relying upon *United States v. Bestfoods*, 524 U.S. 51 (1998), Abitibi argues that the law is that corporate distinctions are maintained in a statutory scheme *unless* Congress affirmatively acts to undo such distinctions.[78] Also, citing *FAG Italia S.p.a. v. United States*, 291 F.3d 806 (Fed. Cir. 2002), Abitibi argues that administrative agencies have no authority to act absent express

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75 *Petitioner's Response Brief* at p. 31.

76 *Id.* at 34.

77 *See, Abitibi Reply Brief* at p. 26.

78 *Id.* at 27.

Congressional authorization.[79] There being no express authorization to collapse, Abitibi concludes, the determination is not according to law.

In any event, argues Abitibi, that Abitibi and SSL operate separately in fact is not disputed. Given the restrictions of their respective timber tenures, the two companies are not free to transfer logs between the two companies. Manipulation of input costs is dealt with specifically in the statute. Therefore, there is no potential for evasion of the purpose of the law.

In its presentation at the hearing, Abitibi emphasized the corporate-law principle. Commerce, for its part, emphasized that it has a long-standing practice reflected in the regulation, on the basis of which Commerce found that "there was a high potential for manipulation of price for production because of the common management between Abitibi and SSL and the intertwined business operations."[80] Questioned by Panelist Hines, counsel for Commerce acknowledged that there is no evidence on the record of manipulation, but reiterated that the regulatory test is whether a significant potential exists. Counsel posited the possibility of the two companies agreeing to allocate exports to the company with the lower dumping rate. In rebuttal, Abitibi noted that SSL's production is but two percent of the volume of Abitibi's production, and log processing cannot be shifted. Therefore, says Abitibi, the hypothetical concern is impossible.

The Panel has three issues before it, namely: (1) whether the practice of collapsing is contrary to the applicable law; (2) if not, whether the guideline under which

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[79] *Id.* at 816-817.

[80] *See,* Tr. at Vol. II, p. 203-4.

Commerce operates [as set out at 19 C.F.R. §351.401(f)[81]] is a reasonable interpretation of its authority; and (3) whether the determination is supported by substantial evidence on the record.

The antidumping law, at 19 U.S.C. § 1673d(c)(1)(B)(i), directs Commerce to "(I) determine the estimated weighted average margin for each exporter and producer individually investigated, and (II) determine ... the all-others rate for all exporters and producers not individually investigated." Likewise, 19 U.S.C. § 1677f-1(c)(1) provides that "the administering authority shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise." The question is thus left open as to whether an "exporter" or "producer" may encompass more

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[81] 19 U.S.C. § 351.401 provides as follows:

> (f) Treatment of affiliated producers in antidumping proceedings--
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> (1) In general.
>
> In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities <u>and</u> the Secretary concludes that there is a significant potential for the manipulation of price or production. [emphasis added]
>
> (2) Significant potential for manipulation.
>
> In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:
>
>> (i)The level of common ownership;
>>
>> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
>>
>> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

than a single corporate entity, i.e., whether Commerce may "collapse" two or more entities, and treat them as a single exporter or producer.[82]

Commerce acknowledges that "The Act does not stipulate how the Department is to calculate a dumping margin for each exporter or producer,"[83] and goes on to state:

> As discussed below, it is a reasonable interpretation of these terms for the Department to calculate a dumping margin for a producer based, in part, on the data of one of its affiliates and apply the same margin to the collapsed producers.
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> * * *
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> While the Act mandates that the Department calculate a dumping margin for each exporter and producer, these statutory provisions do not stipulate how the Department should calculate the dumping margin. *See* 19 U.S.C. § 1677f-1(c)(1); 19 U.S.C. § 1673b(d)(1)(A)(I); 19 U.S.C. § 1673d(c)(1)(B)(i)(I). Where Congress has left a gap for the Department to fill, there is express delegation of authority to the Department to elucidate a specific provision of the statute by regulation. *Chevron* 467 U.S. at 843-844. Such legislative regulations are given controlling weight and this Panel must uphold such a regulation as long as it is reasonable. *Id.* [footnote omitted]. Thus, the [principal] inquiry for this Panel is whether it is reasonable for the Department to base a producers dumping margin, in part, on the data of one of its affiliates and apply the same dumping margin to both producers.
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> The Department's collapsing regulation is a reasonable interpretation of how to calculate a dumping margin for each producer investigated, especially in light of the purpose of the collapsing regulation. The theory underlying the collapsing regulation is that affiliated companies that could easily produce the same product, and between which there exists a significant potential for the manipulation of price and/or production (i.e. the collapsing factors) should be treated as one entity in order to prevent evasion of the dumping order. *See Flowers de Colombia*

[82] Although defining "exporter and producer", § 1677(28) is clearly intended to deal with the situation where the producer is not the exporter, and permits the data of the two to be combined for the purpose of determining costs, etc. in connection with subject merchandise. That definition is not helpful on the issue under discussion.

[83] *Commerce Brief* at Vol. III, p. 11-12.

> 981 F. Supp. at 622 (stating that a principle reason for collapsing is to prevent circumvention of the dumping order.) In essence, treating these producers as one entity means that the Department bases their dumping margin, in part, on the data of their affiliate, and applies the same margin to both. Without reviewing both of the affiliated companies and applying the same dumping margin to both, these companies could switch production or pricing in such a manner as to evade the dumping order. Preventing evasion of the Dumping Law is an important statutory goal of the Dumping Law. *Dastech Int'l Inc. v. ITC*, 963 F. Supp 1220, 1229 (Ct. Int'l Trade 1997); *Mitsubishi Electric Corp. v. United States*, 700 F. Supp. 538, 555 (Ct. Int'l Trade 1988) (*stating* "The ITA has been vested with authority to administer the antidumping laws in accordance with legislative intent. To this end, the ITA has a certain amount of discretion {to act}. . . with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping law.") *aff'd* 898 F.2d 1577 (Fed. Cir. 1990). Courts have consistently given great deference to agency interpretations of statutory terms that further the overall purpose of a statute. *West v. Gibson*, 527 U.S. 212, 222-223 (1999); *Contreras et al. v. United States*, 215 F.3d 1267, 1273 (Fed. Cir. 2000). Thus, as the collapsing regulation is a reasonable interpretation of the Act and furthers an important statutory goal, this Panel must find that the collapsing regulation is fully in accordance with the Act.[84]

Abitibi's reliance on *FAG Italia* is misplaced. Dealing with the situation in which the statute contains a specific provision (in that case, relating to duty-absorption inquiries) applicable to specified circumstances, but making no mention of the circumstances in which Commerce purported to have authority, the majority of the Court held that in the total absence of a statutory provision Commerce lacks authority to fill the gap. For immediate purposes, it is not necessary to interpret *FAG Italia* in the light of *Chevron*. In the circumstances here under review the statute explicitly directs Commerce to make a determination for each "producer" or "exporter". The question is, what meaning is to be given to those words. The "gap" is the lack of definition, not whether words apply.

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[84] *Commerce Brief* at Vol. III, p. 12-14.

The statute fails to provide guidance and is thus ambiguous.[85] In accordance with the principle established by the Supreme Court in *Chevron*, Commerce therefore has the responsibility and authority to formulate a reasonable interpretation of the statute to effectuate its purpose. Although a substantial argument can be made, and has been made by Abitibi, that the terms "exporter" and "producer" may reasonably be interpreted to mean a single legal entity, Commerce has provided a contrary interpretation that is at least reasonable. It is obvious that there may well be circumstances in which two or more legal entities may operate as a group with the ability to allocate production, markets and even customers among members of the group. Commerce practice, as set out in the regulation, is a reasonable general guideline for analyzing particular circumstances. Having regard to the applicable standard of review, this Panel must defer to the interpretation reflected in the practice of Commerce as set out in the regulation.

However, that does not end the matter. The application of the guidelines by Commerce must be reasonable in the circumstances of each case. Commerce emphasizes that the rationale for collapsing is the potential for inter-corporate manipulation, i.e., circumvention. Abitibi's assertion that SSL's lumber production is a minor fraction (about 2%) of Abitibi's production, that neither company may process the other's logs under the applicable provincial law, and that no lumber production of either company was sold to or through the other, stands unrefuted by the evidence of record. Moreover,

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[85] Abitibi and SSL are affiliated persons as defined in the statute, but the definition relates to the provision allowing Commerce to disregard inter-affiliate transactions if prices recorded do not reflect market values. This concept is dealt with elsewhere in this opinion. It is not conclusive of the issue under discussion here. For example, we may take it as given that a mere five percent interest by one person may provide no opportunity for influence over the operations of the entity in which the interest is held. Without more, it would not be reasonable to collapse the two entities in that situation.

the opportunity for manipulation of inter-affiliate prices for processing is controllable by provisions of the law enabling Commerce to disregard such prices. Also, given SSL's production capacity, it appears highly unlikely that its output could contribute significantly to satisfy the requirements of Abitibi's U.S. customers for the purpose of avoiding the dumping margin applicable to Abitibi's exports. If Abitibi were to attempt to funnel exports through SSL,[86] 19 U.S.C. §1677(28) would apply to enable Commerce to treat the producer and exporter as single entity. In sum, the potential for circumvention is negligible. Commerce apparently applied its criteria without regard to the realistic potential for manipulation of production between Abitibi and a fringe operation. In the light of all the relevant evidence, the specific four elements of evidence relied on by Commerce in Comment 14 of the IDM do not amount to substantial evidence of potential for circumvention. Busy studying the trees of 19 C.F.R. §351.401(f)(2), Commerce failed to keep the forest in perspective. Considering the foregoing, the Panel concludes that the determination to treat SSL and Abitibi as a single producer is not supported by substantial evidence on the record and is accordingly remanded to Commerce, with directions to the agency to exclude SSL from the findings pertaining to Abitibi.

#### 2. Commerce's Decision to Allocate Abitibi's Financial Expenses on a Cost of Goods Sold (COGS) Basis for Purposes of Determining Cost of Production and Constructed Value Was Reasonable and Supported by Substantial Evidence

[86] As posited by counsel for Commerce at the hearing, Tr. Vol. II, p. 205. This possibility was not one of the four specific and presumably exhaustive reasons given by Commerce in the IDM at Comment 14.

Respondent Abitibi asserts that Commerce made numerous errors in calculating the general and administrative ("G&A") expenses to be included in the cost of production (COP) and constructed value (CV) of Canadian softwood lumber products produced by its Canadian operations during the period of the investigation. The Panel considers Abitibi's arguments *seriatim*.

First, Abitibi questions Commerce's decision to allocate certain general expenses, particularly financing expenses, according to the cost of goods sold (COGS) by various Abitibi enterprises. According to Abitibi, Commerce acted unreasonably when it followed its normal procedure and allocated Abitibi's net interest expenses, loan fees, bank charges and similar financial services costs according to the company's overall COGS. Abitibi concedes that "as with most companies, Abitibi records its financial expenses as a separate line item in its financial statements, not allocated to particular business segments or products", but notes that "for the purposes of this antidumping investigation, Abitibi developed a methodology suited to its circumstances, and allocated financial expenses between its different business segments in proportion to its assets, as debt and equity are used to finance assets". [87]

Abitibi asserts that Commerce should have allocated financial costs according to the value of the company's assets, since these costs are used to finance assets and "Abitibi's newsprint, paper, and pulp operations are much more asset and thus capital

[87] *Abitibi Brief* at p. 12.

intensive" than its softwood lumber manufacturing operations.[88] Thus, Abitibi argues that although its lumber operations account for 13.6% of the cost of goods sold by the company, they account for only 7.6% of the company's assets, and 10.6% of the company's depreciation expense during the POI. Stated another way, Abitibi asserts that the ratio of assets to cost of sales is lower for its lumber division than for its newsprint or pulp and value-added paper businesses. Abitibi also asserts that its cost of financing receivables are higher in its newsprint and paper businesses than in its lumber business, since customers in those businesses receive more generous commercial terms.

Abitibi acknowledges that Commerce's usual practice is to allocate general expenses according to a company's COGS (as determined at the "parent"company level, i.e., the highest level of financial statement consolidation), but asserts that it was unreasonable for Commerce to follow that practice in this case. While arguing that Commerce has allocated financial expenses between business lines in proportion to assets in at least one case[89], Abitibi asserts that the agency now rigidly uses COGS-based allocations in every case, improperly applying a rigid, "one size fits all" methodology. While an allocation methodology may be uniform, Abitibi argues, this does not

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88 *Id.*

89 *DRAMs from Korea*, 58 Fed. Reg. 15,467, 15, 461 (March 23, 1993)(in which Commerce held that "allocation of interest expense based on cost of sales would not appropriately recognize the expense related to the capital investment necessary for semiconductors compared with other lines of business'). This methodology was upheld by the Court of International Trade in *Micron Technology Inc .v. United States*, 893 F. Supp. 21, 30 (Ct. Int'l Tr.)(holding that Commerce "provided a reasoned analysis" for departing from its normal COGS methodology).

Commerce acknowledges that it used an asset-based valuation methodology in the cited DRAMs case, but also noted that, in subsequent reviews of the same antidumping order , and in review of other semiconductor products, the agency reverted to its COGs methodology. *Commerce Brief at III-30, 31.*

necessarily make the methodology "reasonable" in a particular case, noting that, "if Congress had intended a uniform methodology, it would have legislated one.[90]"

Commerce does not appear to deny that the law permits different bases for allocating financial and other general expenses in particular cases, but argues that its usual COGS methodology to allocate Abitibi's financing expenses was reasonable in this case, and asserts that the Panel must defer to the agency's reasonable methodology, citing *Chevron USA Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-844 (1984) and *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996). See also *American Silicon Techs. Inc. v. United States*, 2003 U.S. App. LEXIS 13506 (Fed. Cir. 2003). Commerce rejects Abitibi's assertion that the agency should proportion interest and finance expenses according to asset values, asserting that Abitibi's position wrongly "assumes that fixed asset purchases is the only activity of the company requiring working capital, and thus it ignores the cash requirements to support current production activities (e.g., raw material purchases, paying workers, paying the energy bills, etc.)." Because cash is needed to fund "both current operations as well as capital acquisitions", it would be inaccurate and erroneous to allocate these expenses across the cost of acquiring assets alone.[91] Furthermore, Commerce argues that, because money is fungible, financing costs need not be allocated with respect to the specific purposes for which funds are used. Thus, Commerce does not associate financial expenses such as interest

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[90] *Abitibi Brief* at p. 22.

[91] *See, Commerce Brief* at Vol. III, p. 28-29.

expense with particular activities, nor does it associate corporate debt with particular assets, since a creditor may have a claim on all of the assets of a corporation.

Commerce argues that its COGS allocation methodology does in fact take into account the fact that different business units of a company may have different capital needs, since a business unit with lower capital costs will likely also have lower depreciation costs factored into its COGS. Even Abitibi appears to concede that the cost of acquiring assets may not accurately reflect financing costs associated with those assets during a given period, since different assets may be subject to different depreciation schedules[92].

Because the statute does not contain a definition of "general selling and administrative expenses", and because the statute does not mandate a particular methodology for allocating such expenses for purposes of computing COP and CV, Commerce enjoys substantial discretion in devising allocation methodologies, and its choices will be upheld where lawful and reasonable. The Panel agrees with Abitibi that the COGS methodology is not necessarily "reasonable" because it is uniformly applied, nor is it likely to be an appropriate methodology in all cases[93].

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[92] Contrary to statements appearing in the IDM, Comment 15 at p. 77, Abitibi does not argue that the company's debt relates *only* to pulp and paper-making activities. Rather, it argues that the debt relates to all of the company's activities, but should be allocated, for purposes of this investigation, according to the value of all corporate assets, including those utilized in producing softwood lumber.

[93] In its brief and at oral argument, Abitibi provided the hypothetical example of a farmer whose asset-intensive farm produces modest sales revenue, and whose side business in gold bullion trading generates large revenues using few assets, to illustrate its point that allocating financial expenses according to COGS will not be reasonable in all cases. While the hypothetical confirms that a COGS-based allocation may be unreasonable in particular cases, it does little to enlighten the Panel on whether Commerce's methodology is unreasonable under the facts of *this* case.

The antidumping statute directs that costs will normally be calculated according to the records of the exporter or producer of merchandise, and that cost allocations must be based on the agency's consideration of "all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs". 19 U.S.C. §1677b(f)(1)(A). The Panel is satisfied that Commerce followed this directive in the instant case and reached a determination which is not unreasonable.

First, the Panel notes that Abitibi's proposed allocation of financial costs based on asset values is not taken from the books and records of the corporation, kept in the ordinary course of business, but was a construct prepared specifically for the purposes of this case. It is not therefore an "allocation historically used by the exporter or producer", *See*, 19 U.S.C. § 1677b(f)(1)(A). Furthermore, while evidence of the record indicates that Abitibi's non-lumber divisions are more capital-intensive than its lumber division, the evidence does not indicate that Abitibi's financial costs relate solely to asset financing. Presumably, these costs may relate in part (perhaps significantly) to the acquisition of materials needed for current production or cash-flow requirements, or to factors other than fixed asset costs. Moreover, because money and debt are fungible, their costs are typically allocated on a company-wide, rather than asset-specific basis, and were so allocated by Abitibi in this case.

Commerce's COGS methodology for allocating general expenses (like any allocation methodology) is imperfect. So, too, is Abitibi's proposed asset-based allocation methodology. Confronted with two conflicting methodologies, either of which might be accepted by a reasonable mind, the Panel is not required to ascertain which alternative is the better one, only whether the alternative selected by Commerce is reasonable. As the governing statute and regulations give Commerce discretion to select the method for allocating G&A expenses in COP and CV determinations, deference to Commerce's decision is appropriate. *See*, *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362 (Fed. Cir. 1999). Deference is appropriate in circumstances where the agency's decision turns upon complex economic and accounting inquiries. *Fujitsu General Inc. v. United States*, 88 F.3d 1034 (Fed. Cir. 1996). Abitibi has not demonstrated that Commerce's COGS methodology in this case is unreasonable, only that it does not reach the same result as might an asset-based allocation, and that it is unfavorable to Abitibi. The differences between the cost of producing lumber relative to Abitibi's total production costs and the value of assets used in lumber production to total corporate assets is not so great in this case as to persuade the Panel that Commerce acted unreasonably. Abitibi's proposed asset-based allocation ignores the fact that finance costs might be incurred for purposes other than the purchase of capital goods[94]. By

[94] Thus, for example, an increase in the cost of a raw material, or in costs of energy needed to produce a particular good, might require corporate borrowing in order to meet such increased costs. A COGS-based allocation method would take account of these financing needs, while the asset-based allocation method proposed by Abitibi would ignore them. Moreover, as noted above, Commerce's COGS-based methodology does not ignore the distribution of assets within a company, as it takes depreciation costs into account in determining costs of goods sold.

contrast, the COGS-based methodology which Commerce used in this case reflects such possible borrowing needs, reflects the fungibility of money, and acknowledges the distribution of assets within a company, since asset depreciation is taken into account in determining the cost of goods sold.

While a COGS-based allocation method may not be reasonable in every case, it was reasonably used in this case to allocate Abitibi's finance expenses, and the Panel sustains this portion of Commerce's Final Determination.

### 3. Commerce's Decision to Treat Abitibi's Goodwill Expense as a "General Expense" for Purposes of Determining Cost of Production and Computed Value is Reasonable and Supported by Substantial Evidence

In calculating Abitibi's COP and CV, Commerce included in general and administrative expenses an amount representing Abitibi's amortized goodwill expenses for the period of investigation. "Goodwill" is defined as the excess of the price paid for an acquired enterprise or other asset over the net value of the assets acquired and liabilities assumed[95]. During the POI, Canadian accounting standards required that goodwill expenses be amortized over a 40-year period.

Subsequent to the POI, both Canada and the United States changed their accounting standards for goodwill expenses, ruling that goodwill may no longer be

[95] See, Afterman and Jones, *Accounting and Auditing Disclosure Manual, §11* (1996). See also Davidson, Hanouille, Stickey and Weil, *Intermediate Accounting* (4th ed. 1985). The parties do not disagree on the definition of "goodwill".

amortized, but is subject to an "impairment" test. That is, goodwill may only be written off if it can be demonstrated that its value has actually declined[96].

Before the Panel, Abitibi contends that Commerce erred in including goodwill amortization in G&A. Abitibi argues, first, that goodwill is not a "general expense", and particularly, that it is not a general, selling or administrative expense "pertaining to production and sales of the like product". *See*, 19 U.S.C. §1677b(b)(3). While Commerce has defined general expenses as those which benefit a company's operations as a whole, Abitibi contends that goodwill does not meet this definition, since "it arises from, and is associated only with the acquisition of particular assets or businesses"[97]. Specifically, goodwill incurred based on Abitibi's purchases of newsprint plants, or plants located within the United States "did not benefit the company and all its products as a whole", but benefited only the operations of Abitibi's United States subsidiaries, and its newsprint and paper-making operations.[98]

Abitibi further contends that the change in United States and Canadian Generally Accepted Accounting Principles (GAAP) regarding the treatment of goodwill establishes that the amortization of goodwill is "arbitrary" and "does not reasonably reflect the cost associated with the production and sale" of softwood lumber, as required by 19 U.S.C. §1677b(f)(1)(A). In the alternative, Abitibi asserts that only goodwill which relates directly to the sale or production of lumber should be taken into account in Commerce's

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[96] Canadian Accounting Standards Board, *Accounting Standards*, § 3062.23 (August 2001); United States Financial Accounting Standards Board, Statement No. 142, *Accounting for Goodwill and Intangible Assets*.

[97] *Abitibi Brief* at p. 27.

[98] *Id.* at p. 27-28.

calculations, i.e., that goodwill expense should be allocated to specific assets, rather than the company as a whole.

In its *Final Determination*, Commerce recognized the change in the GAAP treatment of goodwill, but held that it was inapplicable to the period of investigation. Commerce stated that "the Canadian GAAP in effect at the time that Abitibi published its fiscal year 2000 financial statements required the amortization of goodwill. Thus, as this treatment is in accordance with the contemporaneous GAAP of the Respondent and reasonably reflects production costs, we find no reason to exclude Abitibi's goodwill from the cost of production." *IDM,* Comment 16 at 81.

Commerce contends before the Panel that its decision to treat goodwill amortization as a general expense was reasonable, and in accordance with the agency's longstanding practice. The agency also asserts that goodwill is properly considered to be a general expense, because, as a matter of accounting principles, goodwill is considered to benefit the entire company, and not specific assets. Although it concedes that, in one set of determinations, the agency allocated goodwill on an asset basis,[99] those cases are distinguishable from the instant one, since the expenses in those cases were "expenses that would not normally be allocated over a long period of time".[100]

Initially, the Panel notes that goodwill is treated as an intangible asset, under both former and current Canadian GAAP principles. The change wrought by the amendment

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[99] *See, Aramid Fiber Formed of Poly Para Phenylene Terephthalamide from the Netherlands*, 62 Fed. Reg. 38,058, 38,063 (July 16, 1997); 63 Fed. Reg. 37,516, 37,519 (July 13, 1998); 64 Fed. Reg. 61,822, 61,824 (November 15, 1999).

[100] *Commerce Brief* at Vol. III, p. 38; IDM at Comment 16.

of the Canadian and United States accounting standards does not reclassify goodwill, but merely alters the circumstances under which a company may treat a diminution in the value of goodwill as an expense for accounting purposes. Goodwill may continue to be expensed, but not on the assumption that the asset automatically depreciates over time; it may be expensed only as, and to the extent, that its value is shown to have diminished under a defined "impairment test". The courts have recognized goodwill expenses generally as forming part of the cost of producing goods in a foreign country. *See, e.g., E.I. DuPont de Nemours, Inc. v. United States*, 22 C.I.T. 19 (1998). While Abitibi argues that "[t]here is simply no statutory provision that can be read to permit Commerce to include amortized goodwill in computing cost of production"[101], this misstates the test. The antidumping statute itself neither defines, nor furnishes specific rules for determining which expenses of a corporation may be characterized as "general sales and administrative costs", for purposes of COP calculations. §1677b(f)(1)(A). *See, e.g., Expandable Polystyrene Resins from the Republic of Korea*, 65 Fed. Reg. 69,284 (November 16, 2000)("there is no bright-line definition in the Act of what a G&A expense is"). Reviewing courts have indicated that the mandate given to Commerce in 19 U.S.C. §1677b(f)(1)(A) to identify and calculate such expenses is "relatively flexible", *see*, *Borden Inc. et al. v. United States*, 4 F. Supp. 2d 1221 (Ct. Int'l Tr. 1998), and that Commerce may reject the figures contained in a company's books if it concludes they do not reasonably reflect the costs of producing the goods.

Commerce requires Respondents in antidumping investigations to report data in a manner consistent with home country GAAP. *Asociacion Colombiana de Exportadores*

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[101] *Abitibi Brief* at p. 29.

*de Flores v. United States*, 40 F. Supp. 2d 466 (Ct. Int'l Tr. 1999). Commerce is not required to apply GAAP in all cases. *Ad Hoc Committee of Florida Producers of Gray Portland Cement v. United States*, 25 F. Supp. 2d 352, 363 (Ct. Int'l Tr. 1998). However, if Commerce elects to reject these conventions, it must provide an adequate explanation for why relying on them would be distortive. *Floral Trade Council v. United States*, 41 F. Supp. 2d 319, 336-37 (Ct. Int'l Tr. 1999); *see also Mannesmann-Sumerbank Boru Endustrisi T.A.S. v. United States*, 86 F. Supp. 2d 1266 (Ct. Int'l Tr. 1999).

During the POI, Canadian GAAP not only permitted, but *required*, goodwill expenses to be amortized over a 40-year period. Abitibi's books reflect a cost associated with depreciation of this intangible asset. Commerce's *Final Determination* in this case accepts Abitibi's treatment of goodwill as reported in accordance with then-extant Canadian GAAP, which is facially reasonable. That Canadian accounting authorities may have elected, after the POI, to work a change in the manner and timing in which companies might realize goodwill-related costs does not require Commerce to disregard amortized goodwill depreciation realized in earlier periods. Abitibi has produced no evidence suggesting that the accounting authorities required companies to reverse prior amortization write-offs for goodwill, and, indeed under the current standard, even impairment losses may not be subsequently reversed. The Panel finds that it was not unreasonable for Commerce to treat Abitibi's goodwill amortization during the POI as a general expense.

Moreover, the fact that the antidumping statute is silent as to the definition of general expenses does not preclude Commerce from finding that goodwill amortization is

such an expense. Congressional silence in the statute here indicates that the legislature has left it to the agency to fill the gaps, by making findings which are not inconsistent with the statutory purpose. Such agency determinations are generally entitled to deference from reviewing courts under the doctrine of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). This is not a situation where Congressional silence precludes the agency from taking action, since the statute clearly mandates that "general expenses" are a part of COP and CV, and leaves it to Commerce to define what those expenses are.

Abitibi's assertion that goodwill does not benefit the entire company, but only those parts of the company holding or using the "goodwill assets", contradicts the basic tenets of accounting. As Commerce has noted, goodwill is considered to be "[a]n intangible asset that is not specifically identifiable" and "which is inherent in a continuing business, and *related to the firm as a whole*".[102] While goodwill may be generated by the purchase of specific assets, the goodwill benefit, being intangible, inures to the benefit of the company as a whole.

The Panel may not upset the agency's finding unless it finds the same to be unreasonable, or contrary to law. Given that Commerce and the courts have uniformly found goodwill expenses to be general expenses of producing and selling subject merchandise, given the fact that the goodwill expenses were recorded in Abitibi's books of account for the POI, and given the fact that those expenses were in accordance with GAAP at the time they were recorded, and calculated pursuant to a required depreciation

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[102] *Commerce Brief* at Vol. III, p. 34 (quoting Davidson, Hanouille, Stickey and Weil, *Intermediate Accounting* (4th ed. 1985)).

schedule, the Panel cannot say that Commerce acted unreasonably, and its determination on this point is sustained.

### 4. Commerce Improperly Treated Abitibi's Costs of Redeeming Certain Stock Options as a "General Expense" of Producing Abitibi's Softwood Lumber Products During the Period of Investigation

During the POI, Respondent Abitibi acquired and merged with Donohue, Inc., a Canadian forest products company. During the years prior to the POI, Donohue had granted stock options to key executives, many of which remained outstanding at the time of the merger. Because Donohue's shares would cease to exist after the merger, Abitibi required Donohue to redeem the outstanding options, at an aggregate cost of $49 million Canadian. Pursuant to Canadian GAAP, the redemption value was not booked as a cost in the year the options were redeemed. The options had been granted to the executives as a component of their remuneration for work performed for Donohue in years prior to the POI.

Abitibi did not book any of the redemption expenses as costs of production of softwood lumber during the POI. Notwithstanding this treatment, Commerce added the entire cost of the redemption to Abitibi's general expenses for the POI, which were allocated to Abitibi's various products, including softwood lumber, on a Cost of Goods Sold (COGS) basis. While acknowledging that the options had been granted for periods prior to the POI, Commerce reasoned that the cost of redeeming the options was "part of the cost of the merger". Acknowledging that its calculation represented a departure from Canadian GAAP, Commerce found that the GAAP treatment reflected on Abitibi's books

"does not reasonably reflect the Respondent's cost of production which includes an amount for G&A"[103].

While concurring that the redemption expenses were part of the costs of the merger, Abitibi asserts that "this finding, without more, does not support Commerce's conclusion that the costs must therefore be expensed, much less that the entirety of the expense must be recognized as a production-related expense *in the POI*"[104]. Abitibi notes that it is Commerce's practice to require that stock options be valued as of the date the stock or option is granted, and that the expense, if any, is to be realized at the time of issuance, not at the time of redemption or sale. *See, e.g., SRAMs from Taiwan*, 63 Fed. Reg. 8,909, 8,921-23 (Feb. 23, 1998). Abitibi further notes that United States *Statement of Financial Accounting Standards No. 123* permits a company to report costs associated with the issuance of stock options, and requires the costs to be recognized in the year in which they are granted. Commerce has also ruled that stock repurchases are not to be treated as financing or production costs. *See, e.g., Stainless Steel Bar from Japan*, 56 Fed. Reg. 13,717 (March 14, 2000).

Commerce responds that it reasonably treated Abitibi's redemption costs as G&A costs, and that, because the acquisition occurred during the POI, the redemption costs "related to the operations of the combined company as a whole and are properly recognized as G&A expense". *Final Determination*, at Comment 16. While acknowledging that Canadian GAAP requires option costs to be realized in the year in which the option is granted, Commerce held that the use of Canadian GAAP would be

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103 *See*, IDM at Comment 16, p. 81-82.

104 *Abitibi Brief* at p. 37 (emphasis in original).

distortive "as it does not reasonably reflect the Respondent's cost of production, which includes an amount for G&A". "In other words", Commerce reasoned, "Canadian GAAP was distortive because it did not include within Abitibi's general expenses all costs related to the operations of the combined company as a whole."[105] Commerce also reasoned that redeemed stock options "constitute a form of compensation to employees and, as such as reasonably considered part of G&A".

As noted above, Commerce need not apply or follow GAAP in all cases, but must explain its reasons for departing from GAAP when it does so. *Ad Hoc Committee of Florida Producers of Gray Portland Cement v. United States*, 25 F. Supp. 2d 352, 363 (Ct. Int'l Tr. 1998); *Floral Trade Council v. United States*, 41 F. Supp. 2d 319, 336-37 (Ct. Int'l Tr. 1999). That corporate records prepared according to GAAP are presumed to accurately reflect a company's financial condition was recently affirmed in *American Silicon Techs. v. United States*, 2003 U.S. App. LEXIS 13506 (Fed. Cir. 2003). The standard of review applicable to antidumping determinations requires that Commerce's explanation for its departure be reasonable, and in accordance with law. The Panel finds that Commerce has not provided a reasonable explanation for rejecting Canadian GAAP with respect to this issue.

The options at issue in this case were not awarded by Respondent Abitibi, Inc., but rather by Donohue, Inc. The record establishes that all of the options were awarded prior to the POI, and were awarded to executives of Donohue, Inc. as compensation. If the options relate to any production at all, they would appear to relate to the pre-POI

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[105] *Commerce Brief* at Vol. III, p. 41.

production of Donohue, Inc. It is not sufficient to note that the cost of redeeming the options was a cost of the merger. Commerce must explain how and why the costs are considered a "cost of production", and particularly, a cost of production during the POI. Moreover, Commerce must explain its reasons for departing from the use and acknowledgement of Canadian GAAP, and must indicate how the use of the GAAP figures would be distortive.

The governing statute requires that "[c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) *and reasonably reflect the cost associated with the production and sale of the merchandise*." 19 U.S.C. §1677b(f)(1)(A). Canadian GAAP requires companies to recognize costs associated with the award of options in the year when the options are granted, not when they are redeemed. Commerce has held that claims on equity, such as stock given to employees as compensation, should be realized as an expense in the year when the stock is awarded. *SRAMs from Taiwan*, 63 Fed. Reg, 8,909 (February 23, 1998); *DRAMs from South Korea*, 64 Fed. Reg. 56,308, 56, 321 (October 19, 1999)("stock bonuses must be valued on the date they are authorized"). This is the same approach embodied by the Canadian GAAP rules.

In *Stainless Steel Bar from Japan*, 56 Fed. Reg. 13,717 (March 14, 2000), Commerce excluded from G&A expenses costs associated with retiring certain treasury stock. Before the Panel, Commerce argues that "costs associated with retiring treasury stock is [sic] significantly different from costs associated with redeeming stock options",

since "[r]edeemed stock options constitute a form of compensation to employees and, as such, are reasonably considered part of G&A." Both treasury stock and other stock constitute claims upon the equity of an enterprise, and the qualitative difference claimed by Commerce is not immediately evident to the Panel. In any event, the record demonstrates that GAAP *in Canada* did not require the costs of redeeming options to be treated as a period cost. Commerce has not furnished a cogent reason why such treatment is distortive. Indeed, it appears that it is distortive to assume, as Commerce does, that these expenses relate to the production and sale of merchandise by Abitibi in the POI.

For this reason, the Panel concludes that Commerce's treatment of the cost of redeeming stock options issued to employees of Donohue Inc. is unreasonable, and unsupported by the evidence of record. The Panel remands this case to Commerce with instructions for the agency to exclude these redemption costs from Abitibi's G&A expenses for the POI.

### 5. Commerce Erred by Treating Abitibi's "Trim Blocks" as a Byproduct, Rather than as Subject Merchandise, for Purposes of Calculating Cost of Production and Computed Value

Abitibi questions Commerce's specific instructions to it not to allocate costs of production to trim blocks, and asserts that Commerce's subsequent failure to allocate costs of production to Abitibi's production of trim blocks was not in accordance with law.[106]

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[106] ***See***, *Abitibi Brief* at p. 41-42

Abitibi alleges that its costs of production were overstated as a result of erroneous instructions given to it by Commerce regarding the treatment of trim blocks;[107] that Commerce expressly instructed it, for purposes of computing its costs of production, to treat trim blocks as a by-product rather than as subject merchandise; that no production costs were assigned to the volume of trim blocks produced; and that this thereby increased the cost of production for the remaining softwood lumber products.

Abibiti also maintains that Commerce acted inconsistently. In particular, it alleges that Commerce instructed another Respondent, Canfor, to treat trim blocks as subject merchandise and to allocate costs to their production; that Commerce implicitly ruled in its Final Determination that trim blocks were subject merchandise, but that it nonetheless refused to recalculate Abitibi's cost of production so as to allocate costs to trim blocks. Abitibi concludes that this was inconsistent with Commerce's treatment of the other Respondent.

Trim blocks are the small pieces of softwood lumber that result when larger lengths are trimmed at one or both ends to improve the grade or shorten the size of the primary piece of lumber being produced. In effect, trim blocks are the ends of lumber, which are cut off after lumber is planed.[108] Trim blocks can be sold to lumber remanufacturers for use as inputs in the manufacturing of finger-jointed lumber and other products.[109]

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**107** *Id.*

108 *See,* Abitibi Section D Supplemental Questionnaire Response (Sept. 10, 2001) at SD-5 (PR. 166).

109 *Id.*

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Abitibi states that, on August 10, 2001, Commerce inquired about trim blocks, and instructed Abitibi to treat its sales of trim blocks as by-product revenue. Question 7 of that questionnaire states:

> Abitibi states, on page D-6, that the main by-products resulting from lumber product are wood chips, shavings, sawdust, and trim blocks. Describe the term 'trim blocks' and state how it differs from wood chips. *In addition revise Annex D.2 to include trim blocks as necessary*."[110]

Abitibi contends that Commerce expressly instructed it to include trim block revenue as by-product revenue as an offset to production costs, and Abitibi complied. Abitibi did not report sales of trim blocks nor did it allocate wood or sawmill costs to trim blocks. Instead, allegedly in compliance with Commerce's express instructions, it offset its production costs by the revenue it received from its sales of trim blocks.[111]

Abitibi adds that, unknown to it at that time, Commerce had specifically instructed another Respondent, Canfor, to report sales of trim blocks in its home market and U.S. sales databases.[112] Canfor had done this, allocating its lumber production costs across all subject merchandise, including trim blocks.[113]

After the Preliminary Determination, Abitibi claims that it pointed out this alleged inconsistency to Commerce, and provided the data necessary to recompute its costs in a

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[110] Letter from Department of Commerce to Arnold & Porter, (Aug. 10, 2001) (PR. 123) (emphasis supplied). Annex D.2 was the form supplied by the Department to Respondents for the reporting of by-product revenues. *See* May 25, 2001 Questionnaire at D-23 (R. 216).

[111] *See,* Abitibi Sept. 10, 2002 Supplemental D Response at SD-5 (PR. 166).

[112] Memorandum from Tracy Levstik to Gary Taverman re: reporting requirements for Canfor Corporation (July 17, 2001) at 3 (PR. 82).

[113] *See,* Canfor Corp. Section D Response (July 23, 2001) at D-2 (PR. 86).

manner consistent with that applied to Canfor;[114] but that Commerce continued to treat Abitibi and Canfor differently. Abitibi alleges that such difference in treatment is not in accordance with law; that Commerce had expressly stated that trim blocks are subject merchandise;[115] that trim blocks appear to fall within the scope of the antidumping order issued by Commerce;[116] and that trim blocks were not excluded on account of any of Commerce's scope or class or kind determinations.[117]

Abitibi alleges further, that the costs of production for softwood lumber generally, and for trim blocks in particular, must include materials costs and fabrication costs, *i.e.,* wood costs and sawmill costs, among other costs [19 U.S.C. §1677b(b)(3)]; and that Commerce violated this statutory provision by not allocating wood and sawmill costs to trim blocks. It claims that Commerce had no lawful basis for computing cost of production differently for Canfor than for Abitibi, in a way that disadvantages Abitibi; and that administrative agencies must treat "parties alike when they participate in the same event or when the agency vacillates without reason in its application of a statute or the implementing regulations."[118]

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[114] *See,* Abitibi Feb. 19, 2002 Rebuttal Brief at 22 and App. 2 (PR. 365).

[115] *See,* Memorandum from Tracy Levstik to Gary Taverman re: reporting requirements for Canfor Corporation (July 17, 2001) at 3 (PR. 82) (stating that trim blocks "fall within the definition of dimension lumber" and thus must be reported as subject merchandise).

[116] *See, Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,068 (May 22, 2002) (amend. final determination) ("products covered by this order are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000"); *see also, U.S. Customs Service Ruling* HQ 963443 (Mar. 28, 2000) (classifying trim ends or trim blocks under HTS US 4407.1000 as general lumber).

[117] The Executive Committee has also contended that trim blocks fall within the scope of the Petition. Executive Committee Case Brief re: Abitibi-Consolidated Inc. (Feb. 12, 2002) at 21 (PR. 353).

[118] Abitibi cites *New Orleans Channel 20, Inc. v. F.C.C.*, 830 F.2d 361, 366 (D.C. Cir. 1987).

Abitibi concludes that Commerce bears responsibility for the cost allocations used by Abitibi for trim blocks; that Commerce issued incorrect instructions to a Respondent; and, on remand, that Commerce must correct its error.[119] It requests the Panel to rule that Commerce's failure to assign production costs to Abitibi's trim blocks is not in accordance with law.

In the public hearing, Commerce stated that both it and the Petitioner conceded the issue and support a remand on the issue of trim blocks, as requested by Abitibi.[120] However, Commerce and Abitibi do not agree in regard to the nature and scope of that remand.

In particular, in its Response Brief, Commerce requests that the Panel remand the matter for Commerce "to reconsider its reporting requirements for trim blocks,"[121] "in order to develop a consistent trim blocks reporting requirement."[122] Commerce explains that in the *Final Determination*, it allowed some parties to report trim blocks as subject merchandise and others to report them as by-products and in particular, that it allowed Canfor to report trim block as subject merchandise. It asserts further that it became aware of these differing treatments of trim blocks "... too late in [the] proceeding to allow Commerce time to consider [the] different treatment."[123]

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[119] Abitibi cites in support of its claims *Floral Trade Council v. United States*, 41 F.Supp. 2d 319, 322 n.4 (Ct. Int'l Trade 1999; and *FAG Italia S.p.A. v. United States*, No. 97-02-00260-S, Slip Op. 00-154, 2000 WL 1728317 (Ct. Int'l Trade Nov. 21, 2000).

[120] ***See***, Tr. at Vol. II, p. 169 (Comments by Mr. Michael Shor).

[121] *Commerce Brief* at Vol. III, p. 46.

[122] *Id.* at Vol. II, p. 45.

[123] IDM at Comment 10.

Commerce responds to Abitibi's request for a remand by contending that Commerce made no determination during the course of the investigation relating to how all the Respondents should report trim blocks. As a result, Commerce requests a remand so these issues and facts may be considered and addressed by Commerce before the Panel reviews this determination.[124]

Abitibi asserts that Commerce's remand request is overly broad, and suggests that Commerce might disturb the unchallenged and thus final trim block calculations used for other Respondents. Abitibi argues further that all Commerce can be authorized to do is to fix the calculations for Abitibi, as Abitibi challenged only its own calculations, while the calculations regarding Canfor's trim block were not challenged.[125] Abitibi argues that since no party has challenged the methodology Commerce used for Canfor, the methodology is therefore final and not subject to change by Commerce. The only way to achieve consistency, Abitibi argues, is for the Panel to direct Commerce to assign production costs to Abitibi's trim blocks in the same manner as it did for Canfor.[126]

The Panel agrees that the issue of trim blocks should be remanded. Commerce has acted inconsistently in its treatment of trim blocks from Canfor and Abitibi, a fact which Commerce itself acknowledges.

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[124] *See, Commerce Brief* at Vol. III, p. 46.

[125] *See, Abitibi Reply Brief* at Vol. I.

[126] *Id.*

In determining the nature of the remand, the methodology used by Commerce in regard to Canfor's trim blocks was not the subject of challenge during the course of these proceedings. As a result, it would be arbitrary now for Commerce to treat trim blocks from Canfor as by-products rather than subject-merchandise, particularly given that their treatment as subject-merchandise was never in dispute. Commerce does not contend that its treatment of Canfor's trim blocks was incorrect. Given that like cases should be treated alike, and to avoid arbitrary treatment and inconsistent results, the Panel remands to Commerce with instructions to apply the same methodology in respect of trim blocks from Abitibi that it applied to Canfor.

### 6. Commerce=s Correction of an Obvious Mistake Committed by Respondent Abitibi Was Not Erroneous and Will Not Be Disturbed.

Subsequent to the issuance of Commerce=s *Final Determination* in this case, Respondent Abitibi advised Commerce that it had committed an error in reporting home market sales information. Specifically, Abitibi alerted Commerce to the fact that it had reported a negative freight amount for one of its home market sales transactions B an apparent impossibility. In its *Amended Final Determination*, Commerce corrected Abitibi=s error.

Before the Panel, the Coalition asserts that Commerce erred in correcting Abitibi=s error after the publication of the *Final Determination*. While Commerce has the authority to correct its own ministerial errors by amending the final determination [19 U.S.C. ' 1673d(e); 19 C.F.R. ' 351.224], the Coalition notes that Commerce has a long-

standing practice of correcting a Respondent=s clerical errors only where the allegation of error is submitted prior to the final determination. *See*, *Certain Fresh Cut Flowers from Colombia*, 61 Fed. Reg. 42,883, 42,884 (Aug. 19, 1996).[127]

Having corrected the Abitibi error, Commerce now requests a remand, so that it may "determine if the Department=s actions, including explanation, were in accordance with its practice."[128] *Commerce Brief, at III-123.* Presumably, a remand may result in a determination by Commerce to let the correction stand, or a determination by the agency to reinstate the error in its *Final Determination.* None of the parties suggest that Abitibi actually incurred a negative freight rate on the sale in question (if indeed such a thing is possible); rather, remand is sought to correct a procedural error, namely, Commerce=s tardy acceptance of Abitibi=s confession of error.

The Panel holds that remand on this point is unnecessary, because, even assuming that Commerce committed Aerror@ in rectifying the inaccurate freight rate reported by Abitibi, such an error would have been a harmless one. While courts have the power to set aside administrative actions done without observance of procedures required by law, it is well-settled that courts will not set aside agency action for procedural errors unless the errors were >prejudicial to the party seeking to have the action declared invalid=@. *Sea-Land Service, Inc. v. United States*, 735 F. Supp. 1059, 1063 (Ct. Int=l Tr. 1990), *affirmed*

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[127] Under the test set out in *Fresh Cut Flowers from Colombia*, Commerce will correct a Respondent=s clerical errors only if all of the following conditions are met: (1) the error is a clerical one, not an error in methodology, judgment or substance; (2) reliable corrective documentation in support of the allegation of error is provided, (3) the Respondent has availed itself of the earliest opportunity to correct the error, (4) the error allegation is submitted to Commerce before the due date for the Respondent=s case brief, (5) the error does not entail a substantial revision of the response, and (6) the corrective documentation does not contradict information previously verified.

[128] *Commerce Brief* at Vol. III, p. 123.

*and adopted*, 923 F.2d 838 (Fed. Cir. 1991). The Supreme Court has indicated that administrative action, like court decisions, should be set aside Aonly for substantial procedural or substantive reasons@. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

The doctrine of harmless error has been applied repeatedly to decisions made under the antidumping laws. *See, e.g., Kemira Fibres Oy v. United States*, 61 F.3d 866, 875 (Fed. Cir. 1995). A two step analysis is employed. First, the court must determine whether the error is one which is susceptible to a Aharmless error@ analysis. An error is subject to such an analysis if it is one Afor which the law does not prescribe a consequence@. *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996). Neither the antidumping law nor the regulations specify a consequence in cases where Commerce corrects an obvious clerical or ministerial error following publication of the final determination; indeed, such corrections of errors committed by the agency are specifically authorized by the statute. *See,* 19 U.S.C. '1673d(e). The limitations on Commerce=s correction of such errors, when committed by Respondents, is a matter of agency practice, not the result of a legal or regulatory restriction. Thus, there is no bar to applying Aharmless error@ analysis in this situation.

Second, a reviewing court must determine whether the error is prejudicial to the interests of a party. APrejudice@, for this purpose, is defined as Ainjury to an interest that the statute, regulation or rule in question was designed to protect@. *Intercargo*, 83 F.3d at 396. The burden to demonstrate prejudicial error is on the party claiming the error was prejudicial. *Kemira Fibres*, 61 F.3d at 875. In this regard, the Panel notes that there is no

apparent prejudice to any party from the correction of the Abitibi error. While final determinations under the antidumping statute, as under any administrative scheme, should be Afinal@, it is difficult to perceive of any legitimate interest which would be served by reinstating the error which appeared in Commerce=s *Final Determination* in this action. The error in question B the reporting of a freight expense as a negative number B is manifest from the record before the agency. Indeed, it is an error which could (and perhaps should) have been detected by more thorough agency review of the Abitibi response, and corrected by the agency *sua sponte*. Even assuming, *arguendo,* that the error had been raised earlier, and other parties to the investigation given an opportunity to comment, it seems unlikely that Commerce could have acted any differently than it did.[129]

In this case, the Panel holds that no party is prejudiced by Commerce=s correction of the Abitibi error. Minor procedural irregularities aside, it is difficult to see how any party is entitled to have a final decision based upon information which is obviously and admittedly incorrect. It is difficult to see how affirming a final decision based on admittedly erroneous information furthers the purposes of the antidumping statute.

Any doubt concerning the propriety of Commerce's correction of this admitted error is utterly demolished by the Federal Circuit's recent decision in *Alloy Piping Products Inc. v. United States*, 2003 WL 21480247 (Fed. Cir., June 27, 2003), in which a Respondent in an antidumping investigation advised Commerce of a clerical error in

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[129] *See, e.g., Heveafil Sdn. Bhd. v. United States*, 2001 Ct. Intl. Trade LEXIS 25, Slip Op. 01-22 (February 27, 2001)(Commerce=s failure to permit parties the opportunity to comment on application of a dumping calculation methodology held harmless error, when the court, on the record before it, did Anot see that Commerce could have applied the . . . methodology any differently than it did@).

certain data which the Respondent had submitted. Because the Respondent had called the error to Commerce's attention the day after the agency's *Final Determination* was submitted, the agency held that the error was not "ministerial" in nature, and that a request to correct it after publication of the determination was untimely. The Federal Circuit agreed with Commerce's position that "ministerial" errors included only those committed by the agency, rather than by a private party, but held that, under certain circumstances, an error may be so apparent from the face of the antidumping calculation or from the final determination that, if uncorrected, it "becomes a government error and, hence, a ministerial error."

The reporting of a negative freight rate is an error which is so apparent that Commerce is required to correct it, or the error becomes a "ministerial" one under the principle set out in *Alloy Piping Products, supra*, and the agency's failure to correct it is arbitrary. The Panel need not reach that specific issue in this case, however, because even if one assumes that Commerce violated its own procedures by correcting Abitibi's mistake in its final determination, an "error" resulting from such act is harmless and non-prejudicial. The Panel sees no purpose in a remand which could only change the *Final Determination* by re-introducing an error into it.

Because the procedural error complained of is a harmless one, the Panel denies the requests of the Petitioners and Commerce for a remand on this point.

### 7. Commerce Has Not Adequately Explained its Reasons for Determining Tembec's General Expenses on the Basis of Financial Data Consolidated at the Parent Company Level, Rather than the Verified Data Showing General Expenses of Tembec's Forest Products Division

Tembec challenges the Final Determination with regard to the allocation of company-wide general and administrative expenses to determine the cost of production of the subject merchandise. Tembec summarizes its complaint as follows:

> The antidumping statute requires Commerce to calculate general and administrative (G&A) expenses for cost of production and constructed value purposes based, as closely as possible, on actual data pertaining to the production and sale of the foreign like product. *See* 19 U.S.C. § 1677b(b)(3)(B). Tembec reported its G&A expenses using a factor derived from the audited financial statements of its Forest Products Group, which is the division within which all of the subject merchandise is produced. Commerce verified the accuracy of those data, but nevertheless rejected them in favor of a G&A factor derived from the earnings statement of Tembec Inc., the overall parent company. This company-wide G&A factor reflects Tembec's worldwide pulp, paper and chemical operations, rather than its lumber operations in Canada. The lumber operations represent only [ ] percent of Tembec's sales. The use of the company-wide data, therefore, distorts the cost of production and constructed value calculations.[130]

In response, Commerce asserts that its "... methodology is in accordance with Canadian GAAP, is consistent with established practice, and avoids potential distortions...."[131], and elaborates as follows:

> The statute at sections 773(b)(3)(B) and 773 (e)(2)(A) directs the Department to calculate an amount for selling and general and administrative expenses based on actual data pertaining to the production and sale of the merchandise under consideration. The antidumping law does not prescribe a specific method for calculating the G&A expense rate. When a statute is silent or ambiguous, the determination of a reasonable and appropriate method is left to the discretion of the Department. Because there is no definition in the Act of what a G&A expense is or how the G&A expense rate should be calculated, the Department has developed a consistent and predictable practice for calculating and allocating G&A expenses. This consistent and predictable method is to calculate the rate

130 *Tembec Brief* at p. 11-12.

131 *Commerce Brief* at Vol. III, p. 74.

> based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales and not on a divisional or product-specific basis.[132]

In support of its determination in this case, Commerce cites three previous determinations in which it has explained its practice.[133]

Petitioners assert the correctness of the reasoning employed by Commerce. As does Commerce, Petitioners argue that Commerce's determination is consistent with the statutory requirement that actual data be used for the relevant purpose. Petitioners note that Tembec's Forest Products Group is merely a unit of Tembec Inc. and not a separate business entity, and that the financial data submitted by Tembec was not audited. Moreover, they assert, relying on Commerce reasoning in cited determinations, that if an expense is related to one process or product, it would more appropriately be considered manufacturing cost.

In reply, Tembec emphasizes that the statute requires that the cost of production include an amount for G&A expenses based on the "actual data pertaining to production and sales of the foreign like product…"[134] Tembec elaborates as follows:[135]

> ... Yet, Commerce decided not to focus on the Forest Products Group, whose expenses are dominated by the subject merchandise, and instead looked to all of Tembec Inc., whose expenses include everything from pulp to chemicals. Commerce thus deliberately chose expenses related to many different products, instead of verified data for the Forest Products Group that pertain directly and almost exclusively to the

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[132] *Id.* at Vol. III, p. 75-76; *see also* Final Determination, Comment 33.

[133] *Commerce Response Brief* at Vol. III, p. 75.

[134] *See,* 19 U.S.C. § 1677b(b)(3)(B).

[135] *Tembec Reply Brief*, at 13-15.

production in Canada of the foreign-like product. Tembec incurs significantly different G&A expenses on other products than it incurs in connection with its lumber operations in Canada.

The statute provides for an hierarchy to define "foreign like product."[136] Commerce must first look to subject merchandise, followed by similar merchandise, and then merchandise considered to be the same class or kind. The foreign like product must be foreign, produced in the subject country. Subject merchandise, in this case, covers softwood lumber and, in its most expansive definition, other closely related products, all of which are made exclusively by the Forest Products Group in Canada. Tembec Inc.'s company-wide production is not exclusively performed in Canada, and it is geared overwhelmingly toward pulp, paper and chemicals. Those products do not reasonably come within the definition of foreign like product for this case.

The data from the Forest Products Group meet all the statutory requirements for foreign like product. The data from Tembec Inc. meet none of them. Commerce does not have discretion to defeat the purpose of the statute, or to pervert its plain language.[137]

Tembec has never claimed that the Forest Products Group is "entirely self-sufficient and that the parent company does not contribute to any of its G&A expenses."[138] Head office G&A expenses are allocated fully to each of the divisions or groups in the company, in accordance with Canadian GAAP. The Forest Products Group's G&A figures include an appropriate share of the G&A, company-wide.[139]

Tembec uses the same accounting policies for each business group that it uses for the company as a whole.[140] There is no need, therefore, to compensate for "distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated

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[136] Citing 19 U.S.C. § 1677(16).

[137] Citing, *Timex V.I., Inc. v. United States,* 157 F. 3d 879, 882 (Fed Cir. 1998).

[138] *Commerce Response Brief* at Vol. III, p. 77.

[139] The G&A expenses from all 5 groups that comprise Tembec Inc. add up to the G&A expenses of Tembec Inc. which is Cd$[ ]. *See,* Cost Verification Report, CVE 20, NPR Doc. 329, PR. Doc. 1138.

[140] *See,* Tembec Inc. 2000 Annual Report submitted in Tembec's June 22, 2001 Questionnaire Response, Exh. A-15, at 44, Note 20, PR Doc. 328 ("Tembec Annual Report 2000) ("the accounting policies used in these business segments are the same as those described in the summary of significant accounting policies.").

> disproportionately between divisions."[141] Commerce's rationale for use of company-wide G&A, instead of focusing on foreign like product, does not apply to Tembec.

At the hearing, both Commerce and Petitioners stressed that Commerce practice is long-standing and consistent, and that use of audited G&A for the whole company is dictated by the statute's references to "actual data" and GAAP. As noted below, recent judicial precedent does support the use of consolidated company financial data for this purpose. However, the precedent does not preclude the use of financial data maintained in the regular course of business at another corporate level, nor relieve Commerce of its obligation to at least consider such data.

Tembec correctly emphasizes that the statute requires Commerce to determine the "*actual data* pertaining to the production and sales of the foreign like product" [19 U.S.C. § 1677b(b)(3)(B)(emphasis added)], in this case, softwood lumber. Commerce does not dispute that Tembec's data respecting the Forest Products Group was verified by Commerce. Rather, Commerce and Petitioners argue that the verified data is irrelevant. [Tr. March 4, 2003, pp. 303, 311]

Tembec's argument is fortified by § 1677b(f)(1)(A), as follows:

(A) In general

> Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) **and reasonably reflect the costs associated**

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141 *Commerce Response Brief* at Vol. III, p. 77.

> **with the production and sale of the merchandise**. The administering authority **shall consider all available evidence** on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, **if such allocations have been historically used by the exporter or producer,** in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs.

(emphasis added)

Commerce does not allege that the verified data does not reasonably and accurately allocate a portion of the total-company G&A to the Forest Products Group. Nor do Petitioners.[142] Rather, Commerce resorts to its practice of using company-wide

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[142] Hearing transcript March 4, 2003, page 311, line 11ff:

PANELIST FELTHAM: ...Mr. Quirk. Is it your position that the allocations were inaccurate? The allocations on a divisional basis?

MR. QUIRK: We don't reach that point, and I think for the same reason Commerce doesn't; that to avoid the misallocation, use the companywide statement which will obviate that.

PANELIST FELTHAM: But they were verified. What did they do in the verification process if it's not to determine whether they're accurate?

MR. QUIRK: The numbers can be accurate, but in terms of the allocation within the entire company, the audited statement will tell you whether the allocations are proper.

PANELIST FELTHAM: There's no audited statement that distributes the cost among the various divisions, right?

MR. QUIRK: Yes. But companywide will still give you the best snapshot of the whole company.

PANELIST FELTHAM: Indeed it does.

MR. QUIRK: And that's why Commerce uses it, and we believe they should.

PANELIST FELTHAM: But only 30 percent of the company, according to the information we have, is devoted to lumber production. The other 70 percent plus or minus is devoted to an entirely different product.

MR. QUIRK: Well believe, again that the companywide statement captures and presents the best snapshot as opposed to going on a division basis.

data and asserts that the practice is reasonable because it uses audited data and prevents distortion. However, the verification process is the opportunity for Commerce to determine whether an expense allocation reasonably reflects the actual cost of the producing the subject merchandise. The possibility of misallocation for internal company reasons, i.e., "distortion", must necessarily be the subject of the verification process. Whatever may be the justification for using company-wide G&A when such verified data is not available, it is not reasonable to ignore verified data that satisfies the statutory requirement for *actual data.* However, having verified the data, Commerce falls back on its general practice and concern about possible distortion without addressing the particular facts of this case. No reasonable interpretation of the statute would permit such departure from its express provision. The words "actual data" cannot reasonably be confined to audited company-wide data. Commerce must undertake a complete examination of audited data at both the company-wide and operating levels, where such data exists.

At best, Commerce's position is that the words "actual data" are not defined in the statute, and therefore may be regarded as ambiguous. However, the statute makes it clear that data that reasonably reflect the costs associated with the production and sale of the

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PANELIST FELTHAM: But would it not be possible for Commerce to look at the numbers that are put out by the company and make a determination as to whether that's a reasonable allocation to the production of lumber?

MR. QUIRK: I think it would be an extremely onerous process, especially in a large, integrated company.

merchandise and reflect allocations that have been historically used by the producer cannot be disregarded. 19 U.S.C. § 1677b(f)(1)(A).

Petitioners' argument that would assign allocated G&A expenses to the category of manufacturing cost is not relevant. There is no question that the expenses in issue are G&A. The issue for Commerce was whether Tembec's numbers were reasonable. Commerce verified the data. In summary, the arguments advanced by both Commerce and Petitioners boil down to an assertion of consistent and predictable practice. This alone, however, does not establish that company-wide data will, in all cases, provide an accurate picture a company's actual G&A expenses relating to the production of particular goods.

Recently, in *American Silicon Techs. v United States*, 2003 U.S. App. LEXIS 13506 (Fed. Cir. 2003), Commerce used consolidated financial data of a Belgian-based parent company to determine the financial costs of a Brazilian subsidiary engaged in the production of subject merchandise (in that case, silicon metal). The Court of International Trade directed Commerce to reject the parent company data, and determine the subsidiary's financial costs on the basis of data showing the financial costs of the Brazilian subsidiary engaged in production and exportation of the subject merchandise. Noting that the antidumping statute does not specify a method for calculating the expenses of an exporter which is wholly owned or controlled by a parent company, the Federal Circuit held that Commerce enjoys broad discretion to devise a methodology for calculating "general expenses". See *Micron Tech. Inc. v. United States*, 243 F.3d 1301 (Fed. Cir. 2001). The Federal Circuit also noted that the statute [19 U.S.C. §

1677b(f)(1)(A)] directs Commerce to "consider all available evidence on the proper allocation of costs", and held that the CIT's remand had frustrated the fulfillment of this mandate by precluding Commerce from further assessing the relationship between the parent company and its subsidiaries. "By sharply limiting Commerce's inquiry, the trial court's remand actually prevented Commerce from undertaking a fully balanced examination that might have produced more accurate results", the Federal Circuit ruled.

While noting that appropriate deference is to be accorded to Commerce's choices in this area, the *American Silicon* decision did not announce or endorse a *per* se rule that financial data consolidated at the parent company level will in all cases constitute a reasonable and lawful basis for determining the financial expenses of a particular subsidiary engaged in the production and exportation of subject merchandise. Moreover, that Commerce may follow a "consistent and predictable" practice of using parent company data does not establish that the practice is reasonable in all cases, nor that the practice fulfills the statutory mandate for consideration of "all available evidence on the proper allocation of costs". Indeed, it suggests a pretense for ignoring evidence of record pertaining to subsidiary costs. What the statute requires, as the *American Silicon* decision demonstrates, is that Commerce undertake an inquiry which considers all of the available data, whether reported at the parent or subsidiary levels, assess the relationship between parent and subsidiary (or between these firms and other members of a related company group), and then furnish a reasoned decision for selecting particular data as the basis for calculating financial expenses of the company under investigation. The record in this case

does not reflect the "complete analysis" envisioned by the statute and the *American Silicon* decision.

Accordingly, this issue is remanded to Commerce with instructions for the agency to explain its reasoning that concludes that, based upon consideration of the entire record, the calculation of the G&A ratio at the corporate level, contrary to the verified records of the company, accurately reflects that portion the cost of production of the subject merchandise.

### 8. Commerce Did Not Err in Treating Certain Allegedly "Unusual" Expenses Incurred by Respondent Tembec as General and Administrative Expenses, for Purposes of Calculating the Cost of Production and Computed Value in this Case

Tembec contends that Commerce, in calculating G&A expense, incorrectly added certain "unusual expenses" *i.e.* a one-time charge for the removal of certain capital assets and other related costs, and excluded an offset for income gains realized on the repurchase of preferred shares. The company contends that Commerce has an established practice of excluding expenses from G&A that are unusual in nature and infrequent in occurrence[143] and that the above noted items should have been taken into account in their calculations.

The statute requires that Commerce compute a total amount for G&A expenses in its calculation of cost of production and constructed value. In this instance, the agency included Tembec's cost for the removal of the capital assets and other related expenses

[143] *See, Floral Trade Council v. United States*, 16 C.I.T. 1014, 1016 (1992), *aff'd*, 74 F. 3d 1200 (Fed Cir. 1995).

because the loss that resulted from the disposal of the assets and related expenses were costs to the company's "general operations -- comprised of all general activities associated with the company's core business including the production of the subject merchandise".[144] On the other hand, Commerce did not take into account the income received from the redemption of preferred shares because that event had nothing to do with the general operations of the company. Commerce regarded it as investment income.

The statute directs Commerce to calculate an amount for G&A expenses but it does not prescribe a specific methodology for that calculation. As such, Commerce has discretion to determine a reasonable method for the allocation and calculation of G&A. In this case it relied on the reasoning set out in *Floral Trade*, where the United States Court of International Trade, in elaborating on the meaning of "extraordinary event" in United States Generally Accepted Accounting Principles (GAAP), stated that an event is "unusual in nature" if it is highly abnormal and unrelated or incidentally related to the ordinary and typical activities of the entity, in light of the entity's environment and is "infrequent in occurrence" if it is not reasonably expected to recur in the foreseeable future.

Tembec notes that it reported no unusual items in its Annual Reports for the years 1990-1997 but unusual expense items of a different nature than those involved in this instance were included in the Annual Reports for 1998 and 1999. As the expenses incurred in the removal of the assets in question appeared in the Annual Report for the

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[144] IDM at Comment 33.

year 2000, Tembec claims that their occurrence, once in a decade, makes them unusual and infrequent.

Clearly an expense that occurs once in a 10 year period might be regarded as "unusual" and "infrequent" if the time period is abnormal given the expected useful life of the asset and if it is inconsistent with normal practice within the company or industry. The issue here is whether there was something "extraordinary" relating to the disposal of the assets associated with Tembec's modernization program. Tembec did not provide any justification or other substantive evidence relating to the expected useful life of the assets concerned, or the normal practice relating to asset disposal in the industry, to support its claim. A simple reference to an event as occurring only once in a ten year period does not, in the Panel's view, constitute substantial evidence. We concur with Commerce that the removal of assets and related costs associated with a firm's modernization program are clearly related to its regular operations, are not abnormal and are not infrequent when the assets are disposed of in the normal course of business.

With regard to the treatment of the income gain realized on the repurchase of preferred shares in the company, the Panel is not persuaded that because this amount was reflected as an offset to the unusual expense item referred to above in Tembec's financial statements, this gain was income derived from the general operation of the business. Tembec has not provided any substantive evidence to indicate that the two events were related and were not independent transactions. In the circumstance, we find that Commerce's decision to treat this item as investment income was reasonable.

The Panel affirms Commerce's Final Determination on these two matters.

### 9. The Panel Remands this Case To Commerce With Directions for the Agency to Explain Why its Final Decision Did Not Contain a Clerical or Ministerial Error With Respect to Calculation of Tembec's Credit Expenses

Tembec claims that it identified and notified Commerce of a clerical error that affected the calculation of credit expenses for its home market and U.S. sales; however, Commerce dismissed Tembec's claim as untimely. Tembec has requested that the Panel remand this matter to Commerce with instructions to correct the error.

Commerce claims that it rejected Tembec's request for correction of the error because it was untimely, but asserts in any event that the *Final Determination* did not contain any clerical error requiring correction.

It appears from the record that this matter concerns the identification by Tembec of two possible errors. The first relates to submissions by both Tembec and the Petitioners on April 8 and 9, 2002, alleging that the agency had made a clerical error in relation to an earlier incorrect submission by Tembec. Commerce agreed with the parties that an error had taken place and, on May 1, 2002 released disclosure materials to Tembec indicating the changes that it would be making to its calculations in the *Final Determination*. On May 9, 2002 Tembec filed a further submission alleging that Commerce had made another clerical error in its calculations for the amended *Final*

*Determination*. Commerce rejected this submission on May 14, 2002, pursuant to 19 C.F.R. §351.224(c)(2),[145] as untimely.

Moreover, Commerce maintains that there was no clerical error in its amended *Final Determination*. Petitioners supported the agency's view. This issue is essentially a factual matter relating to whether U.S. dollars or Canadian dollars were correctly adjusted by a currency exchange factor. The record is less than clear, and there is considerable confusion concerning the facts involved. Indeed, Commerce has offered to further explain its position on remand, should the Panel so direct.

The recent Federal Circuit decision in *Alloy Piping Products, Inc. v. United States*, 2003 WL 21480247 (Fed. Cir., June 27, 2003) indicates that Commerce is under a duty to correct clerical errors where those errors "are apparent from the face of Commerce's own final decision or from the calculations underlying that decision and released pursuant to 19 C.F.R. §351.224(b)." Commerce's failure to correct such an error would be arbitrary and capricious. Of course, the starting point for any analysis of Commerce's obligation to correct an error is whether an error was committed at all. Commerce asserts before the Panel that there was no error in its amended *Final Determination*, but does not elaborate on the reasons for this assertion.

Accordingly, the Panel remands this matter to Commerce with instructions for the agency to explain why there was no error concerning the Tembec currency conversion in its amended *Final Determination*; or, if there was such an error, to explain whether the

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[145] 19 C.F.R. § 351.224(c)(2) provides that "A party to the proceeding must file comments concerning ministerial errors within five days after the earlier of: (i) the date on which the Secretary released disclosure documents to that party; or (ii) the date on which the Secretary held a disclosure meeting with that party."

error was apparent from the face of the agency's final decision or the calculations underlying it, and whether Commerce was under a mandatory duty to correct the error.

### 10. The Panel Remands this Case to Commerce With Instructions for the Agency to Explain Why Its Decision to Use Tembec's Internal Prices for Wood Chips as the Basis for Calculating an Offset to Production Costs Was Reasonable

Tembec argues that Commerce's use of the preferential prices that it charged to company divisions for wood chips to calculate an offset to production costs was contrary to law. Rather, Tembec maintains that the prices used by the agency to establish cost offsets in determining the cost of production of lumber should have been the market price for wood chips as provided in 19 U.S.C. §§1677b(f)(1)(A) and 1677b(f)(2).[146]

In this connection, Tembec argues that Commerce, consistent with its recognized administrative practice, should have used market prices rather than the preferential internal transfer prices between Tembec's divisions to establish the cost of production offset for wood chips. Tembec proposed the use of prices at which it *purchased* chips from unaffiliated suppliers in eastern Canada (Tembec's eastern mills do not have sales to unaffiliated buyers) as well as its sales prices of wood chips to unaffiliated buyers by its sawmills in the west.

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[146] 19 U.S.C. § 1677b(f)(1)(A) provides that "costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records…reasonably reflect the costs associated with the production and sale of the merchandise" and section 1677b(f)(2) which provides that transactions between affiliated persons are to be "disregarded if….the amount…does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration."

The Petitioners argue that the by-product offset should be based on actual prices between the mills and that a single by-product offset adjustment should be used for all control numbers for both the eastern and western mills. Petitioners also claim that Commerce should reject the "minor revision" of Tembec's British Columbia wood chip revenue since these corrections result in an unreasonable per unit sales price for chips. Regarding the latter point, both Tembec and Commerce disagree with the Petitioners' claim, noting that it is based on the mistaken assumption that the correction to the reported value of Tembec's external chip sales is related to the correction to the reported volume. The two corrections were independent – the value correction related to an accounting miscalculation and the volume correction was related to a clerical transcription error. These corrections were both verified by Commerce and the Petitioners did not refer to the issue at the oral hearings.

Tembec's wood chip transactions were between divisions of the company. Accordingly, the agency followed its normal practice of attempting to establish the actual cost of the input for use in its calculations of the cost of production of the subject merchandise. In explaining its determination, Commerce noted that its objective is to calculate the COP and CV for a company exclusive of profits and losses made internally between divisions of the company that do not exist for the company as a whole. In other words, Commerce attempts to remove any internal profit from the cost of manufacturing so that all that remains is the company's actual cost of production for the final product. In this instance, because there was no separate identifiable cost of production associated with wood chips that are transferred between Tembec divisions, Commerce, in assessing

whether the average transaction price between Tembec's divisions represented a reasonable cost for wood chips, compared these prices to the prices of wood chips sold to unaffiliated purchasers in British Columbia. This data enabled the agency to conclude that Tembec's internally set prices in British Columbia were not preferential, and used these prices to calculate the byproduct offset.

Commerce found that it did not have usable market price data with respect to wood chip sales in Ontario and Quebec. However since the transfers price between Tembec's British Columbia divisions had been found not to be preferential, Commerce deemed "it reasonable to conclude that [Tembec's] Ontario and Quebec sawmills did not receive preferential prices for their internally transferred wood chips. Thus we relied on their internal transfer prices for the final determination."[147]

In its most simple terms, the issue raised before the Panel by Tembec was whether the cost of production offset for wood chip sales between divisions of the company should be based on the market value of such chips or the cost of production of the chips. In this connection, it is relevant to note that wording of 19 U.S.C. §1677b(f)(1)(A) refers specifically to "the cost associated with the production and sale of the merchandise." In this instance, the subject merchandise is "lumber", not wood chips and, as such, we concur with Commerce that where divisions of the same legal entity are involved, a firm's actual cost of production should not incorporate a profit element for internal transfers associated with production inputs.

However, the agency's objective in this exercise was to establish Tembec's cost of production for lumber, taking into account an appropriate offset for sales of wood

[147] IDM at Comment 11.

chips between its divisions. As noted above, cost of production data for wood chips was not available and, rather than attempting to establish such a figure, Commerce proceeded to determine if the transfer prices between Tembec's divisions represented a reasonable cost associated with the production of wood chips. This process, involving a comparison between internal transfer prices with prices for chips sold to unaffiliated firms in British Columbia, enabled Commerce to conclude that the internally set prices were not preferential. Accordingly, it used Tembec's internal transfer prices in both British Columbia and eastern Canada as representing cost of production for wood chips in these two separate markets.

It is clear from the record that there is a substantial difference between market selling prices for wood chips in eastern and western Canada. It is also clear that there is a significant difference in the internal transfer pricing between Tembec's eastern and western mills. While many factors may influence these numbers, the Panel believes that wood chip costs of production would be an important factor. While identifiable costs of production were not available from Tembec's eastern mills, market sales did occur between Tembec's western mills and unaffiliated firms and this was supported by data chronicling "a large amount of prices paid during the POI by pulp mills for Tembec's wood chips in western Canada with varying prices, depending on the quality, volume and type of wood."[148] These sales no doubt included a factor for profit. What is not clear to the Panel from the record is whether or not the agency's conclusion that the transfer prices between British Columbia sawmills and pulp mills was a reasonable surrogate for the actual cost of wood chips, taking into account the average profit normally earned by

148 *Commerce Brief* at Vol. III, p. 69.

Tembec on its sales of wood chips to unaffiliated purchasers, and whether Commerce's conclusion should have resulted in an adjustment to the transfer prices to more accurately reflect costs of production of the wood chips. Moreover, given the significant price differences between the two markets, clarification is required to enable the Panel to assess how this profit factor was also taken into account with respect to the cost of production on divisional sales in eastern Canada. In this connection, Tembec's purchases of wood chips from unaffiliated firms in eastern Canada might also provide a reasonable indication of profits generally earned by industry in the open market on wood chip sales.

This issue is remanded to the agency for clarification as to how it established that Tembec's internal transfer prices were representative of the cost of production of the wood chips.

**11. Commerce Correctly Treated Profits Earned by Respondent Slocan on Certain Log Sales as a Separate Stream of Revenue, Rather than as Revenue from the Sale of Byproduct, and Reasonably Declined to Treat Those Revenues as Offsets to Slocan's Production Costs for Softwood Lumber**

Respondent Slocan Forest Products Ltd. (Slocan) claims that the revenues realized on the sale of logs that it cannot use in its sawmill operations should be treated as by-product revenue and be deducted as an offset to its lumber production costs. Slocan maintains that log harvesting is an essential part of the lumber production process, that some harvested logs are unsuitable for lumber production and must be sold, that the sold logs are an intermediate product, and that these sales are incidental to its normal business, representing a relatively small part of overall operations. Slocan also notes that it has no

choice under its timber licensing arrangements but to harvest these unwanted logs and that it does not have a separate line of business focused on log sales. The company argues that its sold logs should not be treated as a prime product but rather be regarded in the same manner as swaps, purchased logs or as wood chip sales.

Commerce determined, however, that the profits earned on log sales should not be used to reduce the cost of logs actually used in the production of lumber. They regarded the sold logs as being akin to a line of business other than the manufacture and sale of finished lumber[149] and excluded the profits and cost of sold logs from Slocan's lumber wood costs. Commerce disagreed with Slocan's claim that the sale of logs is analogous to the sale of wood chips, on the ground that the latter are a direct result of a joint production process whereas sold logs, which have their own identifiable costs, never enter into the lumber production process. Petitioners concur with the position taken by the agency.

There is no dispute that Slocan is primarily an integrated producer of lumber from the raw material harvesting stage to completion of finished lumber products, that its timber tenures prohibit the company from leaving commercially viable solid wood at the cut site, and that some timbers cannot be economically processed by certain sawmills and must be sold. All parties agree that when a by-product is sold, the usual practice is for Commerce to treat the revenues from such sales as an offset to production costs. In this case, harvesting is an integral part of the lumber production process and all harvesting costs related to the logs directly used in producing lumber are taken into account in calculating the cost of production as provided for in 19 U.S.C. §1677(b)(3)(A). However,

[149] IDM at Comment 28.

Commerce found that Slocan's sold logs were not "employed in producing the foreign like product" and disallowed the revenues from such sales as a deduction to the cost of the logs used in lumber production.

The issue before the Panel is whether the revenues associated with all goods produced between the timber harvesting stage and the production of finished lumber affect the cost of producing lumber. It is relevant to note that logs can be harvested for more than one use and, while those other uses may be incidental to the primary objective of lumber operation, they can be separate and distinct activities with identifiable costs and sales prices. In other words, while a firm may have an integrated operation involving a seamless process from raw material production through to finished product, it is also possible for it to carry on related activities involving the same raw materials without fully integrating them into its basic operations. Such products would normally be regarded as prime rather than by-products. Commerce concluded that the sold logs were a "prime" product consistent with its decision concerning the treatment of spawned compost and casing soil in *Certain Preserved Mushrooms from Indonesia*.[150]

Agency practice, in accordance with GAAP, is to recognize a particular joint product as either a co-product or a by-product based, in part, on the significance of that product relative to the other joint product(s) and to the producing company as a whole. In past cases, Commerce has looked to several factors in order to measure the significance of particular joint products including (1) the relative sales value of the

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[150] Final Results of Antidumping Administrative Review: *Certain Preserved Mushrooms from Indonesia*, 66 Fed. Reg. 36,754 (July 13, 2001); *see also* IDM at Comment 8.

product compared to that of all other joint products produced during the same time period, (2) whether the product is an unavoidable consequence of producing another product, (3) whether management intentionally controls production of the product, (4) whether the product requires significant further processing after the split-off point and (5) how the company accounts for the product in its records.[151]

At oral argument, counsel for Slocan stated "At the beginning of the production process the logs are harvested. They are cut down. They are hauled out of the forest. They are brought to a scaling station. At the scaling station they are measured for the volume that's in the log, and it's at that point where the producer determines whether the log is something that can go through the mill, whether it needs to go directly through the chipper or whether its something they can possibly sell".[152] This characterization of the process was not refuted. Thus, while the sold logs in question do not enter the sawmill and are not consumed in the production of lumber, their handling is directly related to the process of selecting logs for conversion into lumber i.e. at the point when logs are separated, the logs to be sold are a part of the lumber production process that began at the harvesting stage similar to the logs that are sent directly to the chipper since both are the inevitable result of the harvesting and sawmill decision processes.

In this connection, it is relevant to note that wood chips produced directly from logs are intermingled with chips produced from the unusable portions of the logs that are

[151] *See, Elemental Sulphur from Canada*, Final Results of Antidumping Finding, Administrative Review, 61 Fed. Reg. 8,239-8,253 (March 4, 1996).

[152] Tr. at Vol. II, p. 247.

converted to lumber; such wood chips are treated as a by-product by the agency.[153] Commerce distinguishes this situation from log sales by arguing that wood chips are a by-product resulting from the lumber production process (i.e. cutting the log into constituent parts) and have no identifiable cost.[154] While this explanation does not deal with the treatment of the wood chips that result from logs sent directly to the chipper, the Panel notes that these logs do require further processing prior to their sale. Regarding the issue of fair comparison between sold logs and purchased logs and swaps, it appears to the Panel that in these situations the cost of purchased logs and the costs associated with swaps are fully factored into the cost of production of lumber.

As noted above, Commerce examines a variety of factors to determine whether a product is a by-product and a subjective decision is required by the agency. According to the record, while Slocan's sales of logs are quite substantial they were minor compared to the firm's overall operations, their sold logs were not further processed and the firm, on its books, treats the full revenue from log sales as an offset to woodland costs. It is also evident that the sold logs are an unavoidable consequence of its lumber production business and, although a decision is required in choosing the logs that are to be sold, chipped or directed to lumber processing, the firm does not have a separate business devoted to harvesting and selling logs.

At the same time, the record evidence establishes that Slocan's sold logs never enter the sawmill operation, are not consumed directly in the production of finished lumber, do not require any further processing by the mill and represent a significant

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[153] *See, Slocan Brief* at Footnote 15.

[154] *See, Commerce Response Brief* at Vol. III, p. 65.

element in the business of the firm. Moreover, given the fact that the cost of logs used in the production of lumber is an average resulting from a division of the total harvesting cost by the volume of logs put into the lumber production process, the Panel finds the agency's decision that the sale of other logs at a profit should not affect the cost of the logs actually used to produce lumber to be reasonable, supported by substantial evidence on record and thereby affirms it.

**12. Commerce Correctly Determined that Profits Which Respondent Slocan Earned With Respect to the Sale of Futures Contracts Constituted a Separate Revenue Stream, and Did Not Constitute Either Direct Selling Expenses or an Offset to the Company's Selling Expenses.**

Respondent Slocan challenges Commerce=s refusal to grant a circumstances of sale adjustment with respect to gains that Slocan realized from certain futures contracts Ahedging@ activities. Slocan submits that these gains should be treated as either (1) Adirect selling expenses@ incurred with respect to the sale of softwood lumber products in the United States, or alternatively, (2) as an offset to Slocan=s financial expenses incurred in producing the softwood lumber. Commerce treated Slocan=s gains on futures trading as investment revenue, and made no adjustment in its LTFV comparison in respect of these gains.

The Panel agrees that Slocan=s gains from futures trading are neither direct selling expenses nor financing costs, and sustains the agency's determination.

The record indicates that Respondent Slocan purchases futures contracts on the Chicago Mercantile Exchange (CME) that obligate the company to deliver softwood lumber products at specified prices. During the open life of each such contract,

Slocan monitors United States market conditions to determine whether it should settle the contract A*ex pit*@, by shipping goods pursuant to the contract, or liquidate (sell) the contract and not ship. Where Slocan makes *ex pit* deliveries to United States customers, these deliveries are treated as export sales. Where contracts are liquidated, Slocan does not make lumber sales, but realizes a gain or loss on its sale of the contract. During the POI, Slocan realized a net profit from sales of futures contracts.

The CME requires Slocan to disclose whether its futures contract activity is for purposes of hedging or speculation. Slocan indicated that it is participating in futures contracts for non-speculative hedging purposes and ensures that it will have a sufficient supply of lumber products to satisfy all of the contracts *ex pit*, should it elect to do so.

Slocan asserted that the gains it realized from such futures trading during the POI should have been treated as a circumstances of sales adjustment to export price, specifically, a direct (negative) expense of selling goods for export to the United States. Such an adjustment would increase the export price and reduce the LTFV margin which Commerce determined for Slocan=s sales. In the alternative, Slocan claims that the futures gains should have been treated as an adjustment to the company=s financial expenses. This would reduce the financial costs which the company incurred in producing softwood lumber, and would reduce the Cost of Production (COP) which was determined as the basis of the ANormal Value@ of Slocan=s goods.

In its *Final Determination*, Commerce declined to treat Slocan=s futures gains as the basis for any Acircumstances of sale@ adjustment. In refusing to treat these gains as influencing Slocan=s Adirect selling expenses@ in the United States, Commerce stated:

> Slocan=s sales on the Chicago Mercantile Exchange (CME) can be divided into two categories: those that result in the shipment of

> subject merchandise, and those that do not. Any sales of subject merchandise that occurred during the POI as a result of a futures contract have been included in Slocan=s reported sales list. However, we have not included in our analysis profits on the sales of a [sic] futures contracts that did not result in the shipment of subject merchandise.
>
> We also have not applied these profits as an offset to Slocan=s direct selling expenses. Section 773(a)(6)(C)(iii) of the Act directs the Department to make circumstances of sales adjustments only for direct selling expenses and assumed expenses. Section 351.401(c) defines direct selling expenses as Aexpenses . . . that result from and bear a direct relationship to the particular sale in question.@ Accordingly, where no sale of subject merchandise occurred, there can be no circumstances of sale adjustment for direct selling expenses. [155]

Commerce also rejected Slocan=s claim that its futures trading gains should be treated as an adjustment to the financing costs of the enterprise. The agency=s reasoning was that:

> Slocan suggests that as an alternative, the Department apply the profits as an offset to Slocan=s financial expenses. In support of this argument, Slocan disputes the Department=s statement in its preliminary determination calculation memo that these profits are Ainvestment revenues@ by stating that Slocan is engaging in hedging rather than speculative activity, and that sales on the futures market are integral parts of the company=s normal sales and distribution process. While we agree that Slocan=s lumber futures hedging activity is related to its core business of selling lumber as opposed to speculative investment activity, it is for this very reason that we disagree that the futures contracts are relating to Slocan=s financing activity. As such, the futures profits should not be used to offset the company=s interest expense. [156]

[155] IDM at Comment 21.

[156] *Id.*

The Panel agrees that there is no basis to treat Slocan=s futures trading gains as a Adirect expense@ of its United States sales.

Section 773(a)(6)(C)(iii) of the Tariff Act of 1930, *as amended* [19 U.S.C. ' 1677b(a)(6)(C)(iii)] provides:

> (6) Adjustments. The price described in paragraph (1)(B) shall be B
>
> (C). Increased or decreased by the amount of any difference (or lack thereof) between the export price and the price described under paragraph (1)(B)(other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to . . .
>
> (iii). other differences in the circumstances of sale.

Commerce adjusts its LTFV calculation to deduct from the export price certain "direct selling expenses". 19 C.F.R. §353.410(c) defines "direct selling expenses" as follows:

> (c). Direct selling expenses. ADirect selling expenses@ are expenses, such as commissions, credit expenses, guarantees and warranties, that result from, and bear a direct relationship to, the particular sale in question.

The courts have recognized that, under this regulation, the party claiming the circumstance of sale adjustment bears the burden of establishing, to Commerce=s satisfaction, that the claimed expenses relate directly to particular sales and the amount and nature of the expenses. *See, e.g., Torrington Co. v. United States*, 146 F. Supp. 2d 845 (Ct. Int=l Trade 2001). Any adjustment made under this regulation must be Areasonably attributable to the subject merchandise@. 19 C.F.R. ' 351.102(b). Commerce=s antidumping regulations indicate that Aprice adjustments@ must be tied to sales of subject merchandise, and must be Aa change in the price paid for the

subject merchandise or for the foreign like product, such as discounts, rebates, and post-sale price adjustments, that is reflected in the purchaser=s net outlay@. *Id.*

Commerce correctly found that Slocan=s gains on futures trading activities were not Adirectly related@ to sales of subject merchandise. By definition, Slocan only realized gain or loss on futures trading activities with respect to contracts which did *not* result in sales of subject merchandise. Futures trading profits or losses bore no relationship to Slocan=s import sales of softwood lumber, either in terms of quantity or value.

Slocan asserts that selling expenses need not be tied directly to sales of subject merchandise in order to be treated as Adirect@ selling expenses under 19 U.S.C. ' 353.410(c). For instance, Slocan asserts that Commerce routinely treats warranty expenses as Adirect@ selling expenses, although warranty expenses incurred in one period (e.g., a period of investigation) may relate to sales made in an earlier period.[157] However, neither the statute nor the regulations establish a *per se* rule with respect to the treatment of warranty expenses or other direct selling expenses. Thus, in *NSK Ltd. v. Koyo Seiko.*, 190 F.3d 1321, 1331 (Fed. Cir. 1999), the Federal Circuit ruled that Abecause the statute provides no specific guidelines for the treatment of warranty expenses, Commerce=s interpretation of the statute with respect to circumstances of sale adjustments for warranty expenses cannot be disturbed if reasonable@ [quoting *Zenith Elec. Co. v. United States*, 988 F.2d 1573, 1584 (Fed. Cir. 1993)]. Depending on the specific facts of each case, warranty, technical service and similar expenses have been treated variously as direct selling expenses or indirect selling expenses. *See also Hoogovens Staal BV v. United States*, 138 F. Supp. 2d 1352 (Ct. Int=l Trade 2001); *Sanyo Elec. Co. v. United States*, 9 F. Supp. 2d 688 (Ct. Int=l Trade 1998); *RHP Bearings v. United States*, 875 F. Supp. 854 (Ct. Int=l Trade 1995). In listing exemplars of direct selling expenses, Asuch as@ commissions, credit expenses, and warranty expenses, 19 C.F.R. ' 351.410(c) does not mandate a particular treatment for particular categories of expenses, but rather directs that adjustments be granted for selling expenses Athat result from, and bear a direct relationship to, the particular sale in question.@

[157] *See, Slocan Brief* at p. 7-8.

Because the statute does not Aexpressly limit the exercise of the Secretary=s authority to determine adjustments, nor does it include precise standards or guidelines to govern the exercise of that authority@, a reviewing court will uphold Commerce=s determinations regarding claims of alleged Adirect selling expenses@ if those determinations are reasonable. *See, e.g., NSK Ltd., supra*; *see also Smith-Corona Inc. v. United States*, 713 F.2d 1568, 1575 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

In this case, Commerce=s determination not to treat Slocan=s futures trading gains as a direct selling expense is reasonable, and supported by substantial evidence. Although these gains result from futures contracts which have lumber as their subject, the contracts in no way relate to the sales of subject merchandise made during the period of investigation. By definition, where Slocan made sales (*ex pit* deliveries) of subject merchandise pursuant to a CME contract, it realized no gain or loss on the trading of the futures contract. Similarly, Slocan could have realized gain or loss on futures trading even if it had not made any sales of subject merchandise. These commodities trading activities had no impact on the prices paid by customers who purchased subject merchandise, whether or not the purchases were pursuant to CME contracts. Commerce=s determination is reasonable.

Following Commerce=s determination not to grant a direct selling expense adjustment for Slocan=s futures trading gains, and the agency=s characterization of these gains as investment revenues, Slocan asserted that the gains should be treated as an adjustment to the company=s financing costs, which are reflected in the cost of production. However, both Commerce and the Petitioners assert that no adjustment should be made to

COP for losses or gains which do not relate to production costs. Rather than being related to the cost of financing production, Commerce found these expenses to be Arelated to [Slocan=s] core business of selling lumber as opposed to speculative investment activity@.[158] However, Commerce in its case brief indicated that, to the extent Slocan=s futures trading activities were engaged in for hedging purposes, A[t]his type of futures activity is clearly related to the selling activities and their exposure to price changes. Such a transaction indirectly relates to selling activities and would be an offset to indirect selling expenses@.[159]

Commerce=s decision not to treat Slocan=s futures trading gains as an adjustment to financing expenses is also reasonable and supported by substantial evidence. Slocan=s futures activities appear to have nothing to do with the company=s production of softwood lumber in Canada, nor do they appear to be intended as a method for financing production of softwood lumber.

In cases where sellers have traded in currency futures for hedging purposes, the courts have held that there is no basis to automatically treat the gain or loss from such activities as an adjustment to the price of goods sold for export to the United States. *See, e.g., Thyssen Stahl AG v. United States*, 886 F. Supp. 23 (Ct. Int'l Trade 1995)[Athis court is not persuaded that the law presently permits any adjustment in the computation of dumping margins for either gains or losses which result from the hedging of currencies@]. Thus, Commerce has been upheld in its determinations to deny circumstances of sale adjustments to normal value (foreign market value) resulting from currency hedging

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[158] IDM at Comment 21.

[159] *Commerce Brief* at Vol. III, p. 54.

activities. *See, e.g., Torrington Co. v. United States*, 832 F. Supp. 379 (Ct. Int'l Trade 1993)[160].

Since Commerce's decision on this point is reasonable and supported by the evidence of record, the Panel sustains it.

**13. Commerce Appropriately Used Prices Charged by Canfor to Affiliated Parties for Wood Chips as the Basis for Determining an Offset to Canfor's Cost of Production**

Petitioners allege that Commerce, in determining the amount of wood chip by-product revenue to be applied as offset to the cost of production of Respondent Canfor, acted contrary to law by (a) disregarding Canfor's unaffiliated sale transaction in Alberta, the revenues from which are recorded in Canfor's audited financial records and (b) by comparing Canfor's prices for wood chip sales to affiliated firms in British Columbia to the prices for sales of like goods made by other British Columbia firms to unaffiliated purchasers in British Columbia rather than on a country-wide basis.

Parties agree that Commerce may disregard transactions between affiliated parties that do not fairly reflect the amount usually charged in the market under consideration[161] and, that where sales of the same product are made to unaffiliated parties at different

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[160] However, in certain circumstances, the courts have held that A[p]rofits or losses generated through currency hedging activities relating to transfer of funds generated in the United States have nothing directly to do with the price paid for Respondents=merchandise in the United States market. Gains and losses resulting from currency hedging are part of the indirect expenses of a corporation doing business in the United States market and should be treated as such pursuant to [former] 19 C.F.R. ' 353.56(b)(2)@. *Federal-Mogul Corp. v. United States*, 862 F. Supp. 384, 412 (Ct. Int'l Trade 1994). Such an adjustment is ordinarily provided for in Constructed Export Price (CEP) situations, however, and there has been no request made of the Panel to treat these expenses as indirect expenses.

[161] *See,* 19 U.S.C. § 1677b(f)(2).

prices, such prices are considered to represent market prices and to be at arm's length. In this instance, the information verified by Commerce indicated that the prices obtained by Canfor on its sales to unaffiliated purchasers in Alberta were distorted due to certain contractual agreements. As Canfor did not have other sales to unaffiliated firms, Commerce compared its sales prices for wood chips to its British Columbia affiliates to the weighted average market price of other Respondents' wood chip sales in British Columbia. This comparison enabled Commerce to conclude that Canfor's sales to its affiliates during the POI were made at arm's length and required no adjustment for the final determination.[162]

Commerce disagreed with Petitioner's claim that the usual practice is to evaluate affiliated party transactions on a country-wide basis. In this case, Commerce's found that data obtained at each company's verification and the record evidence shows that wood costs and chip prices vary significantly by region and are influenced by supply and demand for the product, transportation costs and the existence of local pulp mills. As such, these factors were taken into account to reflect the realities of the wood chip market under consideration.[163]

The statute provides Commerce with discretion in determining whether transactions between affiliated parties are at arm's length but does not provide any specific methodology for making this determination. The record establishes that the contractual arrangements between Canfor's two sawmills and unaffiliated firms in

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**162** IDM at Comment 11.

163 *See, Commerce Brief* at Vol. III, p. 123-134.

Alberta were extremely complicated and involved below market fixed pricing for wood chips and logs and special arrangements for other company's chip products. The facts relating to these arrangements were clearly set out in the record and have not been refuted. While the revenues resulting from these transactions were properly accounted for in Canfor's financial records, the Panel is satisfied, based on the record, that the prices for wood chips sales as specified in these contracts were an unreliable measure for the purpose of calculating the by-product revenue offset to Canfor's cost of production

The Final Determination Memorandum[164] notes that the record confirms that wood costs in Canada vary by region and province (different stumpage and harvesting costs), that the prices for wood chips reflect the pricing and cost of logs in individual Canadian markets and that high transportation costs make shipping wood chips over long distances uneconomic. Petitioner contests each of these considerations in its submissions as being unsupported by record evidence but fails to provide substantial evidence to the contrary except to point to the fact that Canfor's Alberta sawmills sold some wood chips to British Columbia mills. The fact that some such sales occurred between these parties does not, in the opinion of the Panel, substantiate that the markets in Alberta and British Columbia are similar. Indeed, such sales may simply reflect an internal corporate decision and a willingness to absorb any additional freight costs involved in such transactions.

The statute, 19 U.S.C. §1677b(f)(2) provides that the agency may determine whether the affiliated party price fairly reflects the "amount usually reflected in sales of merchandise under consideration in the market under consideration". In this connection,

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[164] IDM at Comment 11.

Petitioner uses the terms "country-wide" or "country as a whole" in relation to their interpretation of the statutory words "foreign like product" and "market under consideration" and argues that Commerce must base its calculations on the cost of producing the foreign like product sold for consumption in the country of export as a whole. The Panel's review of these provisions does not support such a rigid interpretation.

The Panel agrees with Commerce that the term "market under consideration" is not expressly defined in the statute and that comparisons between affiliated and unaffiliated party prices should be made on comparable terms to determine if the affiliated transactions are at arm's length. There are many instances where more than one market exists for a particular product in a given country (especially a large country) where transportation costs or trade barriers between regions limit trade between them. In such situations, it may be unreasonable for Commerce to use a country-wide basis for its calculations. Indeed, a fair comparison is more likely to be attained when affiliated and unaffiliated sales are compared in the particular regional market which may or may not correspond to the boundaries of a political subdivision within the country of export. In this case, Commerce reasonably found that it could not use country-wide sales for the reasons cited above and because the record indicated that regional prices provided a more realistic measure of the market.

The Panel agrees with Commerce that Canfor's unrelated wood chip sales in Alberta were unreliable. The record shows that Canfor had no unaffiliated sales of wood chips in B.C and, in this situation, the agency had to seek an alternative pricing method

that was reasonable in the circumstances and would provide a representative basis on which to establish "the amount usually charged in the market under consideration". In this connection it is relevant to note that Commerce rejected an alternative method of calculation that had been proposed by Canfor.

The methodology adopted compared the average price for Canfor's affiliated party wood chip sales in British Columbia during the POI to a benchmark based on the average prices of sales by certain other British Columbia producers to unaffiliated parties in British Columbia during the same period, i.e. a benchmark that reflected the open market price between unrelated firms for like goods in British Columbia This benchmark comparison established that Canfor's prices to affiliates in that market were below the weighted average open market price charged by other British Columbia producers. Accordingly, the agency determined that Canfor's sales were at arm's length and no adjustment was required in respect of the revenue offset to its cost of production for lumber. For the record, it is relevant to note that higher internal prices between Canfor and its affiliates would have resulted in higher revenue offsets and lower overall costs of production for its lumber products.

The issue before this Panel is whether Commerce's actions were reasonable, in accordance with the law and supported by substantial record evidence. Nothing in the statute mandates the methodology that the agency must use to determine if transactions between affiliated parties are at arm's length. Commerce has discretion to adopt a reasonable method and, while there may be a preference for using comparable sales to unaffiliated parties as the benchmark, when such sales cannot be found, it may rely "on

information available" to measure market prices. In this instance, the record demonstrates that the prices Canfor charged to unaffiliated firms in Alberta were below market levels and the complicated arrangements between the parties to these transactions made them particularly suspect as a basis for determining arm's length prices.

In conclusion, the Panel finds that the methodology adopted by Commerce in this case in order to establish the value of Canfor's wood chips and the offset to production costs was reasonable, supported by substantial evidence on the record and in accordance with the law.

### 14. Canfor's Reporting of the Company's Sales of Dog-Eared Fencing Did Not Require Commerce to Apply "Facts Available"

Petitioners allege that Commerce verified that Canfor and its affiliate, Lakeland, failed to report considerable volumes of sales of dog-eared fencing during the POI that could be significant in calculating margins, and assert that Canfor had not acted to the best of its ability to cooperate with the agency. Accordingly, they argue that Commerce, consistent with past practice, should have invoked adverse facts available in respect of the unreported sales.

With regard to the question of reporting requirements, Commerce conducted a completeness test to ensure that Canfor had properly reported sales of 2x2 or greater dimension lumber and found that there was a discrepancy to the extent that the company had not reported dog-eared fence pickets of two inches or greater thickness.[165] However, the Panel concurs with the agency that there was a degree of ambiguity as to whether or

[165] IDM at Comment 17.

not this product was reportable. In this connection, we note that there was a lack of precision relating to thickness in the scope definition for dog-eared fencing. The definitions of scope in both the antidumping and countervailing investigations were changed and Commerce introduced simplified reporting requirements during the investigation.

Concerning the issue of whether Canfor acted to the best of its ability to cooperate with the agency, the record substantiates that, during the period when Canfor was required to prepare its databases it was not clear to the company that fence pickets were reportable. In its various submissions, including the response questionnaire, the company explicitly stated its view that it considered dog-eared fencing to be non-subject goods and openly disclosed that no dog-eared fence products, including those two inches in normal thickness, were reported. As Canfor was not requested to provide additional data regarding its sales of dog-eared fence pickets in any supplemental questionnaires, it had no reason to conclude that its treatment of these sales was improper. Moreover, Canfor claims that it was only on publication of the preliminary determination that Commerce indicated dog-eared fence pickets that were greater than one inch in thickness were intended to be included in the scope of the investigation.[166]

With regard to the Petitioner's contention that Commerce is required to apply adverse inferences when sales are not reported, it is noted that Canfor cooperated and provided the agency with all of the data that was requested in this case. Moreover, Commerce in its verification of Canfor's data established that the quantity of picket

[166] *See, Canfor Brief* at p. 7.

fencing at issue was minuscule compared with total annual sales and that the inclusion of these sales in the databases would have no impact on the dumping margin calculation.[167] Accordingly, Commerce reasonably determined that Canfor provided information to the best of its ability in this instance.

Given the foregoing, the Panel concludes that Commerce's decision not to make any adverse inferences regarding the volume of Canfor's unreported dog-eared fence pickets was reasonable, in accordance with the law, and supported by substantial record evidence.

### 15. Commerce Properly Treated Weyerhaeuser's Costs of Settling Certain Hardboard Siding Litigation as Part of the Company's General and Administrative ("G&A) Expenses, Which Were Allocated in Part to Canadian Softwood Lumber Production

During the period of investigation, Respondent Weyerhaeuser entered into a proposed settlement of a class action lawsuit relating to claimed defects in hardboard siding which Weyerhaeuser sold during the years 1981 through 1999. Hardboard siding is admittedly not "subject merchandise" in this antidumping proceeding involving softwood lumber products. In the audited *Consolidated Statement of Earnings* set out in its 2000 Annual Report, Weyerhaeuser reported the $130 million settlement cost as part of the general administrative expenses for the company as a whole. These expenses were reported under a special "Costs and expenses" category for "[c]harge for settlement of hardboard siding claims", and were not listed in the category for "[c]ost of products sold.

[167] IDM at Comment 17.

In reporting its General & Administrative ("G&A") expenses for purposes of Commerce's cost of production (COP) calculation, Weyerhaeuser calculated a separate G&A rate for its Weyerhaeuser Canada subsidiary – a rate which excluded any part of the $130 million cost for settlement of the hardboard siding litigation.[168]

Commerce rejected Weyerhaeuser's proposed G&A calculation, treating the $130 million settlement cost as a company-wide general expense, and allocating the expense, together with other general expenses, into an overall company ratio, which was distributed to different products according to the company's "company-wide cost of sales"[169]. In this manner, a portion of the settlement costs were treated as part of the general expenses associated with Weyerhaeuser's production of Canadian softwood lumber, increasing the COP. In this respect, Commerce noted that the costs of settling the lawsuit were not "production costs", and were not treated as such in Weyerhaeuser's audited financial statements.

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[168] As explained in Weyerhaeuser's brief before this Panel:

> When Weyerhaeuser calculated its Final GS&A Rate, it had two component rates – one for Weyerhaeuser Company and one for Weyerhaeuser Canada. Weyerhaeuser derived its parent G&A expenses by isolating all corporate company-wide expenses that Weyerhaeuser Company could attribute to Weyerhaeuser Canada. This specifically excluded G&A expenses that could be attributed to all of Weyerhaeuser Company's other operating units, such as its construction and real estate businesses and its overseas operations. Likewise, Weyerhaeuser excluded estimated liabilities associated with Weyerhaeuser Company's settlement of legal claims related to its sale of hardboard siding in the United States. Weyerhaeuser's Cost Verification Exhibit 26 at 30, NPR Doc. 396; Weyerhaeuser's Section A response at Exhibit 15 (CY 2000 Annual Report at 51, 53, 74).

*Weyerhaeuser Brief*, at p. 7.

[169] *Commerce Brief* at Vol. III, p. 113 (*citing* the agency's decision in *Expandable Polystyrene Resins from the Republic of Korea*, 65 Fed. Reg. 69,284 (November 16, 2000), at Comment 7).

Weyerhaeuser asserts that Commerce's treatment of the settlement expense violates 19 U.S.C. §1677b(b)(3)(B), which requires that general and administrative expense calculations must "be based on actual data pertaining to production and sales of the foreign like product by the exporter in question". Asserting that the litigation settlement costs related to "prior-year sales of non-subject merchandise", Weyerhaeuser claims that Commerce may include in the COP calculation for Weyerhaeuser Canada "only those parent G&A expenses that are 'incurred on behalf' of the subsidiary."[170]

The antidumping statute does not furnish hard-and-fast rules for determining which expenses of a corporation should be characterized as "production costs" or as "general sales and administrative costs", but merely states:

> (3) *Calculation of cost of production.* For purposes of this subtitle [19 U.S.C. §§ 1677-1677b(3)], the cost of production shall be an amount equal to the sum of –
>
> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
>
> (B) an amount for selling, administrative and general expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and
>
> (C ) the amount of all containers and coverings of whatever nature . . .

The statute also indicates that "Costs shall normally be calculated based on the records of the exporter or producer of the merchandise . . . " 19 U.S.C. §1677b(f)(1)(A).

Commerce's decision in this case to allocate the litigation settlement costs across Weyerhaeuser's total company-wide cost of sales was claimed to be in accordance with

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170 *Weyerhaeuser Brief* at p. 8.

the agency's typical practice, as set out in *Expandable Polystyrene Resins from the Republic of Korea*, 65 Fed. Reg. 69,284 (November 16, 2000), a test which acknowledges that "there is no bright-line definition in the Act of what a G&A expense is, or how the G&A expense rate should be calculated", and indicates that the agency's usual practice is "to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales, and not on a divisional or product-specific basis". Commerce acknowledges that there "may be more than one way to reasonably allocate" costs, but asserts that its practice is reasonable, predictable and not results-oriented.

In support of its decision to treat Weyerhaeuser's litigation settlement costs as a company-wide expense, and to allocate some of those costs to the subject merchandise, Commerce relies upon its determination – not challenged by Weyerhaeuser – that the settlement costs are not "production costs". Commerce also notes that Weyerhaeuser's audited financial statements do not treat the settlement costs as production costs, and that Weyerhaeuser admittedly did not track G&A costs on a product-specific basis. Moreover, Note 14 to the Weyerhaeuser financial statement, which addressed the hardboard siding settlement, noted that the company "is a party to legal proceedings and environmental matters generally incidental to its business", a comment which Commerce interprets as indicative that Weyerhaeuser considers legal expenses to be a general, rather than product-specific, expense. Since general and administrative expenses are generally understood to encompass expenses which relate to the activities of the company as a whole, rather than to production processes, *see*, *Torrington Co. v. United States*, 146 F.

Supp.2d 845 (Ct. Int'l Tr. 2001); *U.S. Steel Group v. United States*, 998 F. Supp. 1151, 1154 (Ct. Int'l Tr. 1998), Commerce asserts that its decision to treat the hardboard siding settlement expense as a company-wide one, and to allocate it on a company-wide basis, is reasonable and supported by substantial evidence on the record.

Commerce's regulations authorize the agency to allocate expenses in cases where "transaction-specific reporting is not feasible", provided the Secretary "is satisfied that the allocation method used does not cause inaccuracies or distortions." 19 C.F.R. §351.401(g). The regulation requires that a party seeking to report an expense on an allocated basis "must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions". *Id.* Moreover, the regulation indicates that, in assessing whether an allocation is calculated on as specific a basis as is feasible, "the Secretary will take into account the records maintained by the party in question in the ordinary course of its business, as well as such factors as the normal accounting practices in the country and industry in question . . ." *Id.*

The Panel must sustain Commerce's decision regarding the allocation of G&A costs if its determination is reasonable and supported by substantial evidence on the record. This is particularly true where, as here, the statute is ambiguous, and the ascertainment and application of an appropriate methodology is left to Commerce's discretion. *See, Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362 (Fed. Cir. 1999). The Panel is not free to choose between two or more different methodologies which are

"reasonable", so long as the agency's determination is reasonable, lawful and satisfactorily explained. Reviewing courts tend to accord deference to Commerce's determinations where they turn upon complex economic and accounting inquiries. *Fujitsu General Inc. v. United States*, 88 F.3d 1034 (Fed. Cir. 1996).

Commerce's decision to reject Weyerhaeuser's proposed allocation, and to allocate G&A expenses – including the cost of the hardboard siding settlement – according to company-wide costs of goods sold – is supported by substantial evidence and is reasonable. Commerce correctly determined that the litigation settlement costs were not "production costs", and were not treated as such on Weyerhaeuser's books and records. Commerce further found that Weyerhaeuser itself treated these settlement costs, along with other legal expenses incurred in the ordinary cost of business, as company-wide costs. This treatment was approved by the company's auditors, suggesting that the treatment is in accord with generally accepted accounting procedures in Canada. Weyerhaeuser has not asserted otherwise. Commerce's decision to follow the characterization of the costs set out in Weyerhaeuser's audited financial statement also comports with the statutory direction that costs shall normally be calculated on the basis of the records of the exporter or producer of the merchandise. 19 U.S.C. §1677b(f)(1)(A). Where Commerce accepts cost of production information based upon the Respondent's financial statements, maintained in accordance with generally accepted accounting procedures, the agency's determination will generally be sustained. *See*, *Hercules, Inc. v. United States*, 673 F. Supp. 454, 490 (Ct. Int'l Tr. 1987).

Weyerhaeuser's determination to calculate separate G&A rates for the Canadian subsidiary and its parent company is apparently not in accordance with the company's normal accounting practice, and was done solely for purposes of this proceeding. Since the Panel finds Commerce's methodology to be reasonable, we need not reach the issue of whether the Weyerhaeuser proposal is likewise "reasonable", but sustain Commerce's determination on this point[171].

### 16. Commerce Did Not Err by Refusing to Make an Adverse Inference With Respect to Respondent Weyerhaeuser=s Allocation of United States Freight Expenses

The antidumping law requires that home market and United States prices must be reduced by the cost of transporting the merchandise from the original place of shipment to the place of delivery. 19 U.S.C. ' 1677a( c)(2); 19 U.S.C. ' 1677b(a)(6)(B)(i). The statute does not specify a methodology for calculating this adjustment. In addition, the *Statement of Administrative Action* accompanying the *Uruguay Round Agreements Act* indicates that there was no intent to change "Commerce=s current practice, sustained by [the] courts . . ." SAA at 823-24.

[171] Panelist Feltham would remand this matter with instructions to exclude from the portion of Weyerhaeuser Company G&A allocated to the production of softwood lumber by Weyerhaeuser's Canadian subsidiary the recorded amount for the hardboard litigation settlement. In his view, the statutory direction to ascertain the actual cost of production of the subject merchandise renders unreasonable the inclusion of an item that relates only to the operations of the parent company in the United States (not involving subject merchandise) and is separately identified and explained in the financial statements of the parent. The quotation from Note 14 of Weyerhaeuser's consolidated statement of earnings is a commonly used recognition that a company has non-material legal issues generally incidental to its business. As a last and summary paragraph of the note under the heading "Legal Proceedings", it does not convert the separately identified item into a cost incidental to the production of the subject merchandise in this case.

Respondent Weyerhaeuser, a producer and importer of softwood lumber products, reported to Commerce that it distributes products, including but not limited to softwood lumber, to customers through its wholesale distribution division, Weyerhaeuser Building Materials (AWBM@). Weyerhaeuser reported that each WBM delivery truck transports a broad range of construction materials to multiple customers within single trips. WBM does not calculate its costs of transporting materials on a product-specific basis, nor does it calculate these costs on the basis of weight, delivery distance or delivery time.

In its initial response to Commerce=s LTFV questionnaire, Weyerhaeuser reported WBM=s freight expenses for its Canadian and United States warehouses on a value basis, that is, it allocated total freight expenses according to the value (sales prices) of the merchandise delivered. Weyerhaeuser reported that it could not report or allocate freight expenses on a quantity (weight or volume) basis.

Commerce requested Weyerhaeuser to submit supplemental questionnaire responses which reported freight costs on a weight-allocation basis. *See, Final Determination*, Comment 38. Weyerhaeuser responded to this supplemental questionnaire, allocating freight expenses on a weight basis, but advising the agency that it could not verify the accuracy of the weight information. Rather, Weyerhaeuser advised that allocating these expenses on the basis of sales value (prices) was the only identifiable way the company could accurately report its freight expenses to the agency. In January, 2002, Commerce conducted verification of Weyerhaeuser=s responses, including those concerning WBM=s freight expenses. While Commerce found minor errors in Weyerhaeuser=s accounting program, it concluded that these errors were isolated and

not systemic, and thus did not render Weyerhaeuser=s data unreliable. Weyerhaeuser corrected the errors and Commerce verified its responses.

Following verification, Commerce determined that Weyerhaeuser had reasonably allocated its freight expenses on the basis of sales values. The agency found that Weyerhaeuser could not reasonably be expected to allocate freight expenses on a quantity basis, since (1) WBM sells different products, which are denominated in different units of measure (pounds, units, board feet, etc.), (2) WBM=s freight contracts with carriers were not negotiated on a quantity basis, and (3) WBM did not incur its freight costs on an invoice-, customer- or product-specific basis.

Petitioners requested that Commerce apply Aadverse facts available@ to Weyerhaeuser for reporting the WBM freight expenses on a value, rather than quantity basis. Commerce declined, stating that while Weyerhaeuser=s value-based methodology Adoes not resolve the problem of allocating freight between subject and non-subject merchandise@, the company acted to the best of its ability in reporting data and cooperated in all phases of Commerce's investigation.

The Panel holds that Commerce was not required to apply an adverse inference to Weyerhaeuser with respect to that company=s allocation of freight expenses on a value basis. The antidumping statute provides that if Commerce:

> finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [the administering authority], the [administering authority] in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interest of that party in selecting from among the facts otherwise available.

19 U.S.C. ' 1677e(b).

The statute imbues Commerce with authority to determine whether a Respondent has been cooperative with the agency=s requests for information. *See,* 19 C.F.R. ' 351.308(a); *see also F. Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000); *see also Smith-Corona Inc. v. United States*, 713 F.2d 1568 (Fed. Cir. 1983). So long as the agency=s determination concerning the use (or non-use) of an adverse inference is based on substantial evidence, it will not be disturbed by a reviewing court. *See, e.g., Nippon Steel Corp. v. United States*, 118 F. Supp. 2d 1366, 1378 (Ct. Int=l Tr. 2000).

Under 19 U.S.C. ' 1677e(b), Commerce may apply Afacts available@ to make an adverse inference against a party which has failed to cooperate to the best of its ability with an agency request for information. Adverse inference authority is necessary to prevent a Respondent from receiving more favorable treatment from an agency by refusal to cooperate than if it had cooperated completely with the agency. As Commerce is considered to be the Amaster@ of the antidumping law, reviewing courts will typically

defer to the exercise of its special expertise in determining whether an adverse Afacts available@ inference is permissible. *Micron Tech. Inc. v. United States*, 117 F.3d 1386 (Fed. Cir. 1997).

Petitioners, in urging the application of an adverse Afacts available@ inference, asserts that Ausing sales value to determine freight expenses is distortive, as it rests upon the erroneous assumption that the sales value of a product is related to the freight charged for shipment to a particular distance@.[172] While asserting that in the softwood lumber industry, freight costs are based upon volume or weight, Petitioners cannot provide any evidence that costs were so calculated with respect to Weyerhaeuser, nor can it counter Weyerhaeuser's verified evidence that different types of products, sold in different units of measure, were delivered in the same WBM vehicles under various pricing formulae. Indeed, Petitioners' request for the application of adverse inferences is based largely upon speculation that Weyerhaeuser was not being cooperative with Commerce=s requests for information, rather than upon the facts.

While Commerce does not ordinarily accept freight data which is allocated on the basis of sales prices, it does accept such allocations in cases where they are reasonable and not distortive. *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, from Japan*, 56 Fed. Reg. 41,508 (1991). The record in this case, including the reports of verification, contain substantial evidence supporting Commerce=s determination that Weyerhaeuser cooperated with the agency=s request for information, and that its allocation of freight costs on the basis of sales values was not distortive. The agency further determined, on the basis of evidence in the record, that the value-based allocation

[172] *Petitioner's Brief* at p. 63.

was feasible given the records maintained by Weyerhaeuser in the ordinary course of business, and did not cause any inexplicable inaccuracies or distortions. *See, Weyerhaeuser Sales Verification Report,* at 37-38, 59-60.

For these reasons, the Panel holds that Commerce=s decision to accept Weyerhaeuser=s value-based allocation of freight expenses was supported by substantial evidence on the record, and was neither arbitrary nor contrary to law. The agency=s determination on this point is sustained.

**17. The Panel Remands the Case to Commerce to Consider the Claims of Respondent West Fraser With Respect to the Calculation of that Company's Revenues on Wood Chip Sales**

Respondent West Fraser contends that Commerce's decision to adjust that company's reported revenues on its sales of wood chips downward is not supported by substantial evidence, or is otherwise not in accordance with law. West Fraser argues that the agency improperly utilized prices drawn from West Fraser's sales to unaffiliated parties in making the adjustment. These sales to unaffiliated parties are said to be "*de minimis*" in quantity. Further, the majority of these sales were made during the first two months of the period of investigation ("POI"), when chip prices were at their lowest, and were constrained by a long-term contract. West Fraser claims that such a *de minimis* quantity of sales cannot provide the substantial evidence needed to support Commerce's findings.

West Fraser urges that the byproduct offset revenue from its sales to affiliated parties in British Columbia not be adjusted. West Fraser argues that it provided evidence at verification showing that a substantial portion of its sales to affiliated parties in British

Columbia were made at market prices. West Fraser further argues that Commerce did not justify rejecting West Fraser's sales to affiliated parties while finding these same sales to be made at market prices for purposes of making price determinations for Canfor.

Commerce responds that West Fraser did not raise its "*de minimis*" argument during the administrative proceeding and thus is barred from raising that argument before this Panel because West Fraser failed to exhaust its administrative remedies.[173]

The Panel finds that West Fraser is not barred by the exhaustion doctrine from raising its *de minimis* argument. Although West Fraser reported and discussed its unaffiliated party sales in the administrative proceeding in the context of showing that the company's affiliated party sales were at arm's length, West Fraser did not know how Commerce would use that data in its *Final Determination*.[174] It appears from the record that West Fraser believed it had demonstrated the arm's length nature of its affiliated party sales on a mill-specific basis during verification. As a result, West Fraser could have expected the agency to calculate the byproduct offset based on the revenues West

[173] In support of its argument, the Department contends that (1) West Fraser argued during the administrative proceeding that the Department should not continue to conduct the arm's length analysis on a national basis, as it had done in the Preliminary Determination, but should do so on a regional basis; (2) West Fraser was aware that the standard methodology used by the Department was to compare affiliated party sales with unaffiliated party sales in its arm's length analysis; and (3) this methodology had been used in the Preliminary Determination. Therefore, the Department argues, the issue was in front of West Fraser during the administrative proceeding, yet West Fraser did not raise any issue concerning the quantity of its unaffiliated party sales in BC. Consequently, West Fraser should be barred from raising this issue before the Panel.

The Department also contends that West Fraser should only be able to present its argument if it meets one of the exceptions to the doctrine of exhaustion of administrative remedies. The Department then argues that none of the exceptions apply in this case.

[174] *See, e.g., Chefline Corp. v. United States,* 170 F. Supp. 2d 1320, 1334, n.10 (Ct. Int'l Trade 2001).

Fraser recorded in its books and records and to not make any further adjustment.[175] Thus, West Fraser had no reason to raise an issue with regard to the quality of its unaffiliated party sales data prior to the Commerce's Final Determination.[176]

Commerce requested the Panel to remand the issue were the Panel to find West Fraser's *de minimis* claim to not be barred from being raised in this appeal. As the Panel finds the issue to not be barred, the Panel remands this determination to Commerce with instructions to consider West Fraser's *de minimis* argument on the merits. In so doing, the Panel instructs Commerce to further consider the cumulative effect of two related issues that implicate the quality of West Fraser's unaffiliated sales data: whether the timing of the unaffiliated sales (in the earlier part of the POI) and the presence of the long-term contract, together with the asserted *de minimis* quantum of sales, cause the unaffiliated sales data to be not fairly reflective of the prices in the POI.

## C. <u>"CLASS OR KIND" AND SCOPE ISSUES</u>

Several Respondents challenge Commerce=s decision to include certain products within the Aclass or kind@ of merchandise subject to the agency=s investigation and subsequent antidumping duty order against *Softwood Lumber from Canada*. Specific

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175 *See, West Fraser Reply Brief* at Ex. 3, 5.

176 The Petitioner argues, in support of Commerce, that West Fraser's "*de minimis*" argument should be barred by the exhaustion doctrine. The Petitioner cites *Peer Bearing Co. v. United States* 57 F. Supp. 2d 1200 (Ct. Int'l Trade 1999) as an example of a type of complaint that the Court of International Trade has refused to review on appeal.

The Panel finds that the Petitioner's reliance on *Peer Bearing* is misplaced. In *Peer Bearing*, the calculation challenged on appeal was the same calculation used in the Department's Preliminary Determination. Thus the appellant in that case was able to fully review and challenge the calculation prior to the Final Determination. This is not true in the present case.

challenges were raised to the inclusion in the Aclass or kind@ of Western Red Cedar (WRC), Eastern White Pine (EWP), finger-jointed flangestock, and square-end bed frame components. While the Panel renders separate decisions regarding each of these challenges to Commerce=s Aclass or kind@ determination, it is appropriate first to state the deferential standard of review which the Panel is required to apply in review of antidumping determinations, as it applies specifically to these kinds of issues.

The antidumping statute directs the imposition of a compensating duty in cases where the administering authority determines that Aa class or kind of foreign merchandise@ is being, or is likely to be, sold at less than its fair value, and the United States International Trade Commission determines that such sales are causing or threatening material injury to an industry in the United States. 19 U.S.C. ' 1673. In this regard, it is well-settled that Commerce enjoys broad discretion in defining the Aclass or kind@ of merchandise subject to an antidumping investigation. While the agency's determination of whether a product is covered by an antidumping investigation is made with ample deference to the intent of the petition, *Minebea Co. v. United States*, 782 F. Supp. 117, 120 (Ct. Int=l Trade 1992), the Aclass or kind@ of merchandise covered by the agency=s investigation may be broader or narrower than that identified in the petition. *See, Mitsubishi Electric Corp. v. United States*, 700 F. Supp. 538, 555 (Ct. Int=l Trade 1988), *aff=d*, 898 F.2d 1577, 1583 (Fed. Cir. 1992). A petitioner is not required to enumerate all the articles which might be encompassed by the antidumping order it seeks. *Id.* at 559. Commerce may also determine that a petition encompasses several Aclasses or kinds@ of merchandise, and investigate the allegations of the petition accordingly. *See, Torrington Co. v. United States*, 745 F. Supp. 718, 728 (Ct. Int=l Tr. 1992).

An antidumping petition merely proposes an investigation; the purposes of the ensuing investigation is to Adetermine what merchandise should be included in the final order.@ *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096 (Fed. Cir. 2002). The Ascope of an investigation and subsequent determination . . . lies largely in [Commerce=s] discretion.@ *Kern-Liebers USA Inc. v. United States*, 881 F. Supp. 618, 621 (Ct. Int=l Trade 1995). In defining the Aclass or kind@ of merchandise subject to an antidumping investigation, Commerce is not constrained by the classification practices of other agencies. *See, Royal Business Machines Inc. v. United States,* 507 F. Supp. 1007 (Ct. Int'l Trade 1980), *aff=d*, 69 F.2d 692 (Fed. Cir. 1982); *Roquette Freres v. United States*, 583 F. Supp. 599 (Ct. Int'l Trade 1984). Rather, Commerce Aenjoys substantial freedom to interpret and clarify its antidumping orders@. *Dufuerco*, *supra*, 296 F.3d at 1096 (citing *Novosteel SA v. United States*, 284 F.3d 1261 (Fed. Cir. 2002).

In defining the Aclass or kind@ of merchandise subject to an antidumping investigation, the applicable regulations direct Commerce to consider the petitioner=s apparent intent as well as the objective language and descriptions contained in petition. If those factors are not dispositive, Commerce will also consider the factors enumerated by the Court of International Trade in the case of *Diversified Products, Inc. v. United States*, 572 F. Supp. 883 (Ct. Int=l Trade 1983). *Diversified* held that, in determining and interpreting the Aclass or kind@ of merchandise covered by an antidumping determination, Commerce should consider the following factors:

(1) the physical characteristics of the merchandise;

(2) the expectations of the ultimate purchasers;

(3) the ultimate use of the product;

(4) the channels of trade in which the product is sold; and

(5) the manner in which the product is advertised and displayed.

*Id.* at 889. *See also Bohler-Uddeholm Corp. v. United States*, 978 F. Supp. 1176 (Ct. Int=l Trade 1997). No single *Diversified* factor is necessarily dispositive with respect to a Aclass or kind@ determination[177].

Finally, the Panel, like any reviewing court, must apply a deferential standard of review to Commerce=s Aclass or kind@ determinations. The Panel must uphold Commerce=s determination unless it is Aunsupported by substantial evidence on the record, or otherwise not in accordance with law@. 19 U.S.C. ' 1516a(b)(1)(B)(i). ASubstantial evidence@ is more than a mere scintilla. It means such evidence as a reasonable mind might accept to support a conclusion.@ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). Substantial evidence is Asomething less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency=s finding from being supported by substantial evidence.@ *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)(citations omitted). Like a reviewing court, this Panel may not Asubstitute its judgment for that of the [agency] when the

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[177] Commerce also uses the *Diversified* factors in making Ascope@ determinations, that is, deciding whether a later-presented product is within the Aclass or kind@ of merchandise covered by a previously-issued antidumping order. See 19 C.F.R. ' 351.225(k). The agency=s application of these factors in a Ascope ruling@ situation may be subject to somewhat greater judicial review, since the agency must also consider in such cases the prior determinations made by Commerce and the International Trade Commission, and must take care not to expand prior antidumping orders beyond their original terms. See *Ericsson GE Mobile Communications Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995).

choice is >between two fairly conflicting views, even though the [Panel] would have justifiably made a different choice had the matter been before it *de novo*=.@ *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), quoting *Penntech Papers Inc. v. NLRB*, 706 F.2d 18, 22-23 (1st Cir. 1983)(quoting, in turn, *Universal Camera*, 340 U.S. at 488).

Accordingly, with proper acknowledgment of how the standard of review is to be applied, the Panel now addresses the various challenges to Commerce=s determination of the Aclass or kind@ of merchandise subject to the antidumping investigation of *Softwood Lumber from Canada*.

**1. Commerce Properly Determined that Western Red Cedar Did Not Represent a Separate "Class or Kind" of Merchandise**

Respondents assert that Western Red Cedar (WRC) should have been considered a separate Aclass or kind@ of merchandise from the other Canadian softwood lumber products under investigation[178]. In support of this argument, the Respondents point to ample evidence on the administrative record indicating that WRC, as a species of softwood, has distinctive characteristics of appearance, durability, fragrance, dimensional stability, thermal and sound insulation qualities and light weight. In addition, it has its own grading system, established by the National Lumber Grades Authority. The record indicates that Commerce, in reaching its decision that WRC was within the Aclass or kind@ of merchandise under investigation, took note of these

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[178] Although Respondents=Joint Brief argued that WRC is a separate class or kind of merchandise which is Aoutside of the scope of the investigation@, *Respondents' Brief* at p. 21, at oral argument, counsel for Respondent Weyerhaeuser clarified this position, claiming that WRC was not beyond the reach of the softwood lumber products covered by the petition or by Commerce=s investigation, but should have been treated as a separate Aclass or kind@ of merchandise, and analyzed separately.

characteristics. *See,* Commerce Department *Issues and Decision Memorandum* (IDM) at 154-156; PR Doc. 1263. Respondents also note that WRC is extensively used for non-structural, decorative purposes, is generally sold at higher prices than most softwood lumber products, and is distributed through more specialized channels that most other types of lumber.

While acknowledging that WRC had some distinctive characteristics, Commerce determined that these characteristics, alone, do Anot make WRC sufficiently unique among all other softwood species to create a separate class or kind of merchandise@. *See, Preliminary Scope Memorandum*, PR Doc. 1263, at 24. Commerce also ruled that the characteristics which Respondents claimed rendered WRC distinguishable from other softwood lumber was in fact shared by various other softwood lumber products which were included in the Aclass or kind@ of goods under investigation:

> The Department found that these other species possess similar distinct and commercially important characteristics such as attractive appearance . . . light weight [Eastern White Cedar and Eastern White Pine], natural durability (EWC and old growth shop and clear) and lower structural strength (EWP and EWC). By noting these similar characteristics, we are not suggesting that these species are mirror images of WRC. Rather, we are simply indicating that WRC is not so different from other softwood species in its physical characteristics that it cannot be linked on a continuum of softwood lumber products.

PR Doc. 1304, Comment 52. Commerce also noted that other types of softwood lumber were considered to be Aappearance grade@ and, like WRC, prized for their distinctive appearance, and that many other types of softwood lumber were less durable, exhibited low structural strength, and were harvested and milled in the same manner as WRC (pointing, in particular, to Aspecies

such as Sitka spruce, Douglas fir and Coastal hemlock@). *Id.* Commerce noted that other forms of softwood lumber were used for non-structural applications.

Commerce did not reject wholesale the Respondents= assertions that WRC was distinguishable from other species of softwood lumber under investigation. It noted that WRC engendered different customer expectations, in part due to its distinctive uses [*Preliminary Scope Memorandum*, PR Doc. 1263 at 27], but also noted that customer expectations for WRC were similar with expectations for other types of Aappearance grade@ softwood lumber products. Commerce likewise acknowledged that appearance grade lumbers such as WRC were frequently marketed through specialized channels which differed from those used for Astructural@ grade lumber, but the agency found that distribution channels for WRC were not completely different from those for other softwood lumbers within the class or kind under investigation.

Finally, while Commerce acknowledged that WRC was often advertised as a unique product, this was also true of other softwood lumbers within the class or kind of merchandise under investigation, such as Eastern White Cedar and Eastern White Pine, and that advertising and marketing did not provide Aa clear dividing line for WRC with respect to this criterion.@

On the basis of its analysis, Commerce declined to rule that WRC was a separate Aclass or kind@ of merchandise from the other forms of softwood lumber under investigation, and declined to perform a separate investigation of WRC.

The Panel finds that Commerce=s determination not to treat WRC as a separate Aclass or kind@ of merchandise is supported by substantial evidence on the record, and is not contrary to law. As noted above, Commerce has considerable discretion in defining the Aclass or kind@ of

merchandise subject to an antidumping investigation, and its determinations in this regard are reviewed according to a deferential standard. Commerce=s decision to analyze the status of WRC by comparing the product to other forms of softwood lumber unambiguously within the Aclass or kind@ of merchandise is an appropriate methodology which has been upheld by the courts. *See, Novosteel USA Inc. v. United States*, 284 F.3d 1261 (Fed. Cir. 2002). There is substantial evidence in the administrative record to establish that WRC has a number of common physical characteristics with other forms of softwood lumber which are unquestionably within the identified Aclass or kind@ of merchandise under investigation. Not every distinguishing physical characteristic between goods rises to the level of a Aclass or kind@ distinction. *Id.* Furthermore, substantial evidence supports Commerce=s determination that other types of softwood lumber within the class or kind are used for the same Aappearance@ purposes as WRC. While other types of softwood lumber may be more suited to Astructural@ uses, it is well established that, in applying the *Diversified Products* criteria, A[t]he ultimate use criterion does not require a complete overlap of uses to be supported by substantial evidence.@ *Novosteel, USA Inc.,* 128 F. Supp. 2d 720, 735 (Ct. Int=l Trade 2001), *aff=d*, 284 F.3d 1261 (Fed. Cir. 2002). In like fashion, the record contains substantial evidence confirming Commerce=s determination there is overlap between the channels of trade and advertising methods used for WRC and the channels of trade and advertising methods used for other type of Aappearance@ grade softwood lumber. While WRC may engender customer expectations which are unique, the record shows those expectations are not dissimilar to customer expectations engendered by other types of softwood lumber. The final determination in this case indicates that Commerce did in fact consider the

distinctions inherent within the various products included in the investigation [*see, Koyo Seiko Co. Ltd. v. United States*, 768 F. Supp. 832 (Ct. Int'l Trade 1991)], and based its determination on an analysis of the *Diversified Products* criteria and other appropriate factors.

A[I]t is well settled that Commerce has discretion in how to balance the *Diversified Products* criteria@. *Koyo Seiko Co. Ltd. v. United States*, 955 F. Supp. 1532, 1547 (Ct. Int=l Tr. 1997); *see also Shieldalloy Metallurgical Corp. v. United States*, 975 F.Supp. 361, 364 (Ct. Int=l Tr. 1997); *Smith-Corona Corp. v. United States*, 698 F. Supp. 240, 253 (1988). The agency=s decision to treat WRC as being part of the same Aclass or kind@ as the other softwood lumber under investigation is supported by substantial evidence on the record. There is no basis for the Panel to overturn that determination, to re-weigh the evidence of the record, or to substitute its judgment for that of the agency[179].

**2. Commerce Correctly Held that Eastern White Pine Did Not Represent a Separate "Class or Kind" of Merchandise**

Certain Respondents argue that Commerce erred by not determining that Eastern White Pine (EWP) was a separate Aclass or kind@ of merchandise for purposes of the antidumping

[179] It may also be observed that the present investigation involves a great number of products whose each of whose properties span a Acontinuum@. Had Respondents asked that different portions of a Acontinuum@ be treated as separate Aclasses or kinds@ B for example, if they had asked that Aappearance lumber@ be distinguished from Astructural lumber@ B Commerce would have needed to perform a broader analysis along these lines. [That is not to say the Panel would still not uphold a finding of a single Aclass or kind@]. Instead, Respondents asked that a single type of wood B WRC B be plucked out of the continuum and treated as a separate Aclass or kind, but do not challenge the inclusion or retention in the Aclass or kind@ of other softwoods having similar characteristics, uses, channels of trade, etc. Given the factors identified by the courts for analyzing Aclass or kind@ issues, Respondents seeking such particular relief bear a high burden of proving that the product in question belongs to a different Aclass or kind@.

investigation. In furtherance of this argument, Respondents argue that EWP has unique physical characteristics Athat distinguish it from softwood lumber@.[180] Specifically, EWP is described as having a distinctive color, with relatively few knots, and having a relatively low strength to weight ratio, making it softer and more vulnerable to impact damage. EWP is said to have high dimensional stability, and to carry fluids well, making it easy to stain, and allowing it to accept a variety of finishes. EWP has its own grading system, which is based on appearance rather than structural uses, and is produced using unique manufacturing methods.

EWP is said to be used extensively in the manufacture of furniture, and is typically custom-dried for such applications. Customers demand EWP for its dimensional stability and appearance, while softwood lumber is said to be valued for its strength and resistance to splitting. Respondents assert that EWP is sold through different channels of trade than other types of softwood lumber, and, for example, is generally shipped by truck rather than rail. Respondents assert that an application of the *Diversified Products* criteria, discussed above, mandates a determination that EWP should have been treated as a separate Aclass or kind@ of merchandise for purposes of this investigation.

Commerce argues that the Respondent=s analysis rests upon fine or trivial distinctions, and that such analysis would unreasonably lead to the conclusion that ACommerce must create a separate class or kind for each lumber product which is valued for its own unique appearance.@[181] Rather, Commerce claims that it correctly applied the *Diversified Products* factors and

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180 *Respondents' Brief* at p. 34.
181 *Commerce Brief* at Vol. II, p. 25.

reasonably determined that EWP was within the single Aclass or kind@ of softwood lumber products covered by its investigation.

Specifically, Commerce found that, while there are some physical characteristics unique to every type of softwood lumber, EWP Ashares its general physical characteristics with other pine species, particularly the Western Pines@.[182] While conceding that EWP might, for example, have a longer drying time than other types of softwood lumber, Commerce found that this was not a distinction which rose to the level of establishing a different Aclass or kind@ of merchandise. Commerce gave weight to evidence presented by the Petitioners indicating that EWP had characteristics similar to products such as Ponderosa Pine, Sugar Pine and Idaho pine. *Id.* While Respondents argue before the Panel that Commerce=s analysis is flawed because it has not been shown that the other pines to which EWP was compared were Aunambiguously within the scope@ of the investigation, they have made no showing that these other pines were outside the Aclass or kind@ under investigation. Indeed, the Respondents appear to concede that, when EWP is compared to the other pines noted above, the only major difference under the *Diversified Products* criteria relates to Achannels of distribution@. However, the only distinction asserted is that EWP is sold primarily in the eastern United States, while the Western Pines are sold almost exclusively in the West.[183] However, the fact that different products might be sold in different geographical regions does not establish that their channels of distribution are qualitatively dissimilar.

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**182** IDM, at comment 52.

183 *Id.* at 40-41.

Commerce based its determination not to treat EWP as a separate Aclass or kind@ of merchandise on the application of the *Diversified Products* factors, and evidence in the record. For instance, Commerce found that differences in color or shading of different types of lumber does not necessarily cleave those goods into different classes or kinds. In terms of general appearance, strength, dimensional stability, stain retention and other physical characteristics, Commerce determined that EWP was similar to Western pines, which were within the identified Aclass or kind@.

Commerce also determined, based on evidence of record, that EWP was used for similar purposes as other softwood lumber types included in the investigation. Although appearance-based grading systems existed for EWP, the agency found that other types of softwood lumber were used for the same specialty products (millwork, knotty pine paneling, siding and board, shelving, boxes and crates, boats, wooden wares and novelties) as other kinds of softwood lumber. While EWP is not primarily used for construction purposes, Commerce found that there was evidence of record demonstrating that EWP was used as construction lumber to some degree. Here again, it is noted that the petition in this case did not seek merely an antidumping investigation of Astructural@ lumber, and the inclusion of numerous other types of Aappearance-grade@ softwood within the order is not challenged.

Thus, with respect to the Acustomer expectations@ factor of *Diversified Products*, Commerce found that the variety of sizes, colors and densities among the various softwood lumber products included in the investigation was so broad that many of the subject woods were valued by customers for their appearance. The evidence did not therefore support the proposition

that the customer expectations for EWP were so unique as to weigh in favor of a determination that EWP constituted a separate Aclass or kind@ of softwood lumber, requiring a separate antidumping investigation. Similarly, Commerce concluded that the evidence of record did not clearly support the proposition that EWP was sold through different channels than other types of softwood lumber.

With respect to manner of advertisement and display, Commerce agreed that EWP is marketed and displayed in a different manner than many other types of softwood lumber. However, Commerce found that this factor was not unique to EWP, since other softwood lumbers within the "class or kind", such as Western Red Cedar and Eastern White Cedar, were also advertised in similar fashion which called attention to species-specific characteristics.

The Panel holds that Commerce=s determination not to treat EWP as a separate "class or kind" of merchandise is supported by substantial evidence on the record, and is not contrary to law. As noted above, Commerce enjoys considerable latitude in defining the Aclass or kind@ of merchandise subject to an investigation. In deciding whether an antidumping petition calls for an investigation of one Aclass or kind@ of merchandise, or multiple Aclasses or kinds@, Commerce is permitted to consider the language and intent of the petition, and, if it deems it necessary, to apply the *Diversified Products* criteria. The *Diversified Products* criteria do not require complete commonality of physical characteristics, uses, customer expectations, channels of trade or advertising methods in order to include different products into a single Aclass or kind@. Indeed, if Congress had intended that separate antidumping investigations be conducted for each product capable of being separately identified or distinguished, it could have so provided. However, the

antidumping law does not so require, and instead, contemplates investigations addressed to Aclasses or kinds@ of products which may have distinctive individual characteristics, but which may reasonably be united by one or more common factors.

It is unquestioned that EWP is a softwood lumber, and that it is one of several types of Aappearance grade@ lumbers included in the class or kind of goods subject to investigation. In determining that EWP was included within the single class or kind of softwood lumber defined in this investigation, Commerce properly took into account commonalities in physical characteristics, uses, and distribution channels for the merchandise. Substantial evidence on the record supports the agency=s findings with respect to these factors. It is clear that the agency elected to give more weight to certain factors than to others. However, with the agency having considered the proper factors, it is not the province of this Panel to reweigh the evidence or to substitute its judgment for that of Commerce. Even assuming, arguendo, that reasonable minds might be able to draw different conclusions from an analysis of the evidence of record, this alone would not establish that Commerce=s choice is not supported by substantial evidence. The Panel affirms Commerce=s decision not to treat EWP as a separate class or kind of merchandise.

### 3. Commerce’s Decision Not to Treat Finger-Jointed Flangestock as a Separate Class or Kind of Merchandise is Not Supported by Substantial Evidence on the Record

Commerce determined that Finger-Jointed Flangestock (FJF) is within the Aclass or kind@ of merchandise subject to the antidumping investigation of *Softwood Lumber from Canada*.

Because Commerce did not provide a reasoned explanation of its decision from which the Panel may reasonably discern the agency=s decision path, the Panel remands this issue to Commerce with instructions for the agency to provide a detailed and reasoned explanation for its determination.

In contrast to the other products covered by this investigation, FJF is an engineered product which is manufactured in lengths of up to 66 feet. It is produced by kiln-drying rough lumber and subjected to machine stress rating (AMSR@) tests which gauge its strength and stiffness. The lumber is then segregated by MSR grade, treated to remove defects, and cut with a saw to create a Atooth and groove@ pattern on the end of the pieces, which is necessary for finger-jointing. Individual pieces of finger-grooved lumber are then joined together with adhesive, and passed through an oven where the adhesive is cured with radio frequency energy. Upon removal from the oven, the product is cut to the length specified by the purchaser.

There is a single use for FJF B the product is used exclusively by I-beam manufacturers as a component of fabricated structural wood members. FJF is manufactured to specifications issued by the buyer, and is often accompanied by a copy of a testing report.

Respondents assert that FJF is not of the same Aclass or kind@ of merchandise as the other software lumber products which are the subject of the antidumping petition and Commerce=s ensuing investigation. They stress that FJF is a manufactured product distinguishable by its length, which Commerce concedes to be an Aunusual characteristic@,[184] while the other products

[184] *See,* IDM at Comment 52 .

covered by the investigation are Alimited to the length of the log@.[185] They stress that FJF has a unique use which, in turn, dictates a unique channel of distribution. It is advertised and marketed differently than softwood lumber products B in effect, they are not advertised, since they are sold to a single class of purchasers, who frequently order them custom made to specific lengths and strengths.

Commerce nonetheless held FJF to be within the Aclass of kind@ of *Softwood Lumber* products covered by the investigation. The agency=s *Preliminary Scope Memorandum* stated:

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185 *Respondents' Joint Brief* at Vol. II, p. 44.

> While the particular length of certain finger-jointed flanges is an unusual characteristic of the product, we cannot regard flanges as anything but another lumber product in a broad field of lumber products with distinct characteristics and end-uses. We have examined all the *Diversified Products* arguments presented by [Respondents] and have not found any differences which satisfy any of the *Diversified Products* criteria. The particular construction, strength rating, dimension and end-use of flanges cannot be the sole basis for their treatment as a separate class or kind. If this were the case, the number of separate classes or kinds that the Department would be obliged to create would be too numerous to administer.

P.R. Doc. 1263, at 31-32. In its Final Determination, Commerce reaffirmed its position that AWe have not found any differences which would satisfy any of the *Diversified Products* criteria to the extent that we would treat flange stock as a separate class or kind.@ PR Doc. 1304, Comment 52.

However, Commerce did find that, besides its unique length, evidence showed FJF to occupy a Adistinct channel of trade (sales to I-beam producers)@ and a Amanner of advertising@ which involved direct sales to those I-beam producers. Moreover, while Commerce states that it relied upon the *Diversified Products* criteria in reaching its determination regarding FJF, its decision did not explain how the relevant factors were applied to FJF. Before the Panel, Commerce argues that its decision to apply the *Diversified Products* factors Adoes not mean, however, that Commerce must, in every case, for every producer or exporter, needlessly explain its analysis of each *Diversified Products* factor if it is clear on the record that under some of the factors, a party=s product is not unique in light of other products covered by the scope@.[186] Yet

[186] *Commerce Brief* at Vol. II, p. 32.

Commerce also admits that it Adetermined that FJF=s unique length, channel of trade and manner of advertising potentially differentiated this softwood lumber product from other products under the scope@.[187] While acknowledging that it did not provide a full explanation of its decision regarding FJF, Commerce insists that its analysis may be discerned from a review of its decision as a whole. According to the agency, its *Final Determination* explained that it had used the *Diversified Products* factors, and Aarticulated that it was only addressing those factors which it believed to be arguably unique in comparison with other merchandise subject to the scope@.[188]

The Panel cannot discern the factors upon which Commerce relied in determining that FJF was included within the class or kind of merchandise subject to this investigation, and included within the ambit of the resulting antidumping order. It is particularly unclear how Commerce applied the *Diversified Products* factors to this product. For example, Commerce does not explain how it compared the physical characteristics of FJF to those of goods unambiguously within the Aclass or kind@. While Commerce noted that FJF was available in longer lengths than the other Alog-size limited@ products within the Aclass or kind@, there seem to be additional significant differences between FJF and the other softwood lumber products embraced by the investigation. For one thing, FJF is a manufactured product, composed of multiple pieces of lumber which have been joined together with adhesives and oven-cured using radio frequency. Unlike the other products unambiguously within the class or kind, FJF is

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[187] *Id.*

[188] *Id.* at Vol. II, p. 34.

produced to customer specification, in engineered lengths, and is sold on the basis of testing and certification which relates not merely to the quality of the lumber used, but also to the quality of the manufacturing process. Commerce=s *Final Determination* does not point to any other engineered, assembled or manufactured products which are unambiguously within the class or kind of merchandise. Nor does Commerce identify the physical similarities which FJF shares with other softwood lumber products. Under these circumstances, Commerce=s statement that FJF is just Aanother lumber product in a broad field of lumber products with distinct characteristics and end uses@ is not an explanation that relates to any of the *Diversified Products* factors. The observation that something is a Alumber product in a broad field of lumber products@ might be made with equal ease concerning wooden furniture or other manufactured goods of wood.

Furthermore, to the extent that Commerce concedes that FJF has a singular and unique use, and is traded in different channels of distribution than other types of softwood lumber, it is clear that these *Diversified Products* criteria do not support Commerce=s determination with respect to FJF. The unique uses and channels of trade of FJF would also appear to indicate that customer expectations for FJF are unique and different for other, non-manufactured, forms of softwood lumber. It is also difficult to comprehend how the manner of advertising of the products B FJF is not advertised B supports Commerce=s decision. That a product is not advertised does not, by itself, establish its inclusion or exclusion from any “class or kind” of merchandise.

In short, while Commerce purports to have applied the *Diversified* factors in rendering its "class or kind" determination regarding FJF, the agency=s decision does not indicate how FJF has any commonality with the other members of the Aclass or kind@, when analyzed under those factors.

As previously explained, Commerce enjoys broad discretion in defining the Aclass or kind@ of merchandise subject to an antidumping investigation, and a reviewing court or Panel is not free to substitute its judgment for that of the agency. However, in order for a reviewing entity to evaluate the agency=s conduct under the Asubstantial transformation@ standard of review, it is necessary that the agency provide a reasoned explanation of its decision. This determination need not be exhaustive, but is sufficient Aif the agency=s path may be reasonably discerned@. *Bowman Transportation v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974). Commerce need not provide an explicit explanation for every point of analysis, but must leave a sufficient decisional map from which a reviewing court may discern the path of reasoning which led to the final outcome. *See, Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369-70 (Fed. Cir. 1998). In this case, the explanation for including FJF in the single Aclass or kind@ of merchandise investigated does not satisfy minimum requirements needed to permit review under the Asubstantial evidence@ standard. As noted above, merely characterizing FJF as Aanother lumber product in a broad field of lumber products@ is unrevealing, and says nothing regarding the *Diversified Products* criteria which Commerce claims to have applied here. A flat statement that A[t]he particular construction, strength rating, dimension and end-use of flanges cannot be the sole basis for their treatment as a separate class or kind@ is similarly uninformative. It is clear that, under the *Diversified Products* criteria, differences in construction and end-use, for example, *can* be (but need not necessarily be) the basis for a finding that goods are of a separate Aclass or kind@. Commerce has not explained why, *in this case*, the identified factors were deemed not to constitute evidence that FJF was of

a different class or kind that the other lumber products included in the antidumping order. Nor does Commerce explain what facts in the record support its decision to treat FJF as part of the single Aclass or kind@ of merchandise identified.

The fact that an investigation may contain a large number of products, or that conducting the necessary analysis might yield numerous different Aclasses or kinds@ does not constitute an explanation of why FJF is within the single Aclass or kind@ found here. Obviously, Commerce cannot, during the course of an investigation, anticipate every possible inquiry concerning the breadth of the Aclass or kind@B hence the agency is called upon to issue post-investigation Ascope rulings" B but where interested parties who are Aparties to the proceeding@, raise a specific issue concerning the definition of the Aclass or kind@, Commerce must decide the issue, and provide a reviewable basis for its decision. Commerce did not do that here.

Accordingly, the Panel remands this case to Commerce, with instructions for the agency to provide a complete explanation of its decision that FJF is included within the single Aclass or kind@ that encompasses the other products which are admittedly covered by the antidumping order. In this regard, Commerce is to explain how it applied each of the *Diversified Product* factors in respect of FJF, the determinations reached with respect to each such factor, and how it weighed these factors in reaching its determination.

### 4. Commerce Erred When it Held that Square End Bed Frame Components Did Not Constitute a Separate "Class or Kind" of Merchandise

Respondent Abitibi challenges Commerce=s decision to include certain square-end bed frame components (including end filters, L-braces, center support and similar products) within the Aclass or kind@ of merchandise subject to the antidumping order. In this regard, Abitibi notes that the antidumping order *excludes*:

> Radius-cut box-spring-frame components, not exceeding 1" in actual thickness or 83" in length, ready for assembly without further processing. The radius cuts must be present on both ends of the boards and must be substantial cuts so as to completely round one corner.

*Decision Memorandum.* Abitibi submits that, as application of the *Diversified Products* factors resulted in a conclusion that radius-cut bed frame components were not within the Aclass or kind@ of merchandise subject to the antidumping order, the application of those same factors should yield a similar conclusion with respect to square end components. Abitibi asserts that square-end bed frame components are a different “class or kind” of produce based upon their customization, value-added processing, dedicated use and lack of interchangeability with the goods targeted in the antidumping petition.

Commerce, in its final determination, agreed with the domestic producers that Ait is difficult to distinguish square-end bed frame components from other lumber, based on their physical characteristics@.[189] In its application of the *Diversified Products* criteria to this product, Commerce acknowledges evidence on the administrative record which demonstrates that square-end bed frame components are made in specific dimensions, and that some components, such as AL-braces@, are uniquely shaped. The agency notes that these bed frame components are made expressly to the specifications of bed frame manufacturers, have no other use than to be manufactured into bed frames, and

[189] IDM at Comment 52.

are sold in a separate channel of trade than other softwood lumber products B to a single class of purchasers, on the basis of annual contracts, without Aspot@ sales, and with no retail marketing. Furthermore, evidence of record indicates that bed frame components are not sold individually, but are sold in combination with the other components needed to make a bed frame. There appears to be no dispute that, were bed frame components to be sold in individual Akits@, containing all the components necessary to make a single bed frame, they would be outside the scope of Commerce=s investigation[190]. Moreover, the petitioners have conceded and agreed that Aradius-end@ bed frame components are not encompassed by the antidumping order.

In the Issues and Decision Memorandum accompanying its *Final Determination,* Commerce indicated that:

> . . . we also analyzed these products under the Diversified Products criteria including end-use and market channels to the extent the information on record permitted us to do so. In fact, we stated that there were relatively stronger arguments for separate class or kind of treatment under these criteria than under physical characteristics. However, we determined that the differences do not rise to those of a separate class or kind. Regarding customer expectations, we note that these are bound to the specific end use, as is this case with many other lumber specialty products. However, because there are a multitude of lumber specialty products that are defined by their end use, it is not practical to consider each one as a potential separate class or kind of merchandise. On the same basis, for purposes of determining a separate class or kind, we are unable to draw

[190] However, Respondents note that bed frames are generally not sold as individual Akits@, since it would be prohibitively costly to pack, ship and store bed frame components in individual Akit@ form, and since such packing would not be compatible with bed frame producers=Aassembly line@ type manufacturing operations. See. PR Docs. 648, 2001.

> a clear line between bedframe components and other specialty lumber products when we consider the marketing channels and methods of advertising.

Commerce further concluded that:

> The difference between the square-end and radius end bedframe components is not a class or kind issue. We agree with the petitioners that both products are lumber. We granted a scope exclusion to the radius cut components because the petitioners agreed to this exclusion based on the fact that the radius cut components are readily identifiable.

Even granting that the removal of radius-cut bed frame components and bed frame Akits@ from the investigation were a matter of Ascope exclusion@, the Respondents have properly raised an argument that square-end bed frame components are not of the same Aclass or kind@ as the other softwood lumber products which were the subject of the antidumping investigation. Commerce concedes this, and its *Final Determination* analyzes square-end bed frame components using at least some of the *Diversified Products* factors. Focusing narrowly on this analysis, the Panel concludes that Commerce has not explained its conclusion that the application of the *Diversified Products* factors shows square-end bed frame components to be of the same Aclass or kind@ as the other goods under investigation. The Panel remands this issue to Commerce, with instructions for the agency to perform a complete analysis of the *Diversified* factors with respect to square end bed frame components, to report its conclusion with respect to each of these factors, and to report to the Panel on how it weighed its determinations with respect to each of these factors.

A review of the *Final Determination* in this case does not provide an explanation of Commerce=s Aclass or kind@ determination which is sufficient to allow the Panel to discern the agency=s decision path. With respect to the Aphysical characteristics@ criterion set out in *Diversified*, Commerce has concluded that it is Adifficult to distinguish square-end bed frame components from other lumber, based on their physical characteristics@. Even assuming there is a degree of difficulty in making such distinctions, Commerce=s decision appears to concede that physical differences exist. The *Diversified* test requires, as its first definitional step, that the physical characteristics of the good being analyzed be identified, and then compared with the characteristics of goods which are admittedly within the "class or kind". If there are no differences in physical characteristics, or if such differences are minor, this might support an agency finding that this *Diversified* factor points in favor of including the good in the same Aclass or kind@. But a mere assertion that it is Adifficult@ to distinguish bed-frame components from other lumber does not inform the Panel or a reviewing court of what precise similarities or differences might form the basis for the agency=s conclusion. Even under the deferential standard of review which this Panel applies, Commerce=s rationale in this case is insufficient to permit a determination of whether its apparent conclusion regarding this prong of the *Diversified* test is supported by substantial evidence on the record. The Panel is not free to assume what similarities or differences might have been identified by Commerce.

With respect to two other *Diversified* factors -- expectations of ultimate purchasers and end use of the merchandise -- Commerce=s *Final Determination* concedes

that there were Arelatively stronger arguments for separate class or kind treatment under these criteria than under physical characteristics@. However, Commerce then held that:

> Regarding customer expectations, we note that these are bound to the specific end use, as is the case with many other specialty lumber products. However, because there are a multitude of lumber specialty products that are defined by their end use, it is not practical to consider each one as a potential separate class or kind of merchandise. One the same basis, for purposes of determining a separate class or kind, we are unable to draw a clear line between bedframe components and other specialty lumber products when we consider the marketing channels and methods of advertising.[191]

However, this statement does not appear to reflect Commerce=s application of the *Diversified* factors to square-end bed frame components, but rather an abdication of the agency=s responsibility to do so. Conceding that Athere are a multitude of lumber specialty products that are defined by their end use@, Commerce thereby establishes that there is a basis to apply this *Diversified* factor in its analysis of *Softwood Lumber* products, but then declines to do so on the ground that it would be Aimpractical@. Nothing in the *Diversified Products* test indicates that it is not to be applied in complex cases involving a large number of products. Moreover, Commerce=s argument that it is Aimpractical@ to consider the *Diversified* factors of end-use and customer expectations in this case is belied by the agency=s application of those factors in making Aclass or kind@ determinations regarding other products, such as Western Red Cedar and Eastern White Pine.

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[191] IDM at Comment 52.

Similarly, the agency=s conclusion that it is Aunable to draw a clear line@ between bed frame components and other specialty lumber products Awhen we consider the marketing channels and methods of advertising@ represents a further abdication of Commerce=s obligation to apply this *Diversified* factor to square-end bed frame components. Indeed, given the apparently uncontradicted evidence of record, easily discernible by the Panel, suggesting that bed frame components are sold through a unique marketing channel, without advertising, it would seem readily possible to make specific findings on this point. The Panel will not make such findings, but will instead remand this matter to Commerce with instructions for the agency to do so.

### 5. Commerce Correctly Concluded that Used Railroad Ties Did Not Constitute a Separate "Class or Kind" of Merchandise

Respondent Anderson Wholesale, Inc. ("Anderson") seeks a determination that used railroad ties are not a class or kind of merchandise properly included within the scope of the Final Determination. Anderson describes the history of the used ties, and points out that new railroad ties are not included within the scope of the investigation. The discarded used ties are imported into the United States for use in landscaping. Anderson's arguments may be summarized as follows: 1) It is not logical to include used railroad ties because new railroad ties are not included; 2) Only softwood lumber that falls under HTSUS 4407 and 4409 when first manufactured in Canada should be included (Anderson relies on the fact that the SLA covered only such products); 3) Petitioners did not intend to include used ties within the scope of the investigation, noting that used ties

are not of suitable quality for manufacturing other products; and 4) Application of the *Diversified Products* test should result in a determination that used ties are not of the same class or kind as softwood lumber, i.e., they are sufficiently different that they properly fall outside that classification. They note that ties are used and have split ends and damaged sides. Some may be hardwood and/or may have been manufactured in the United States, but they acknowledge that they cannot determine which, if any ties, are such. Also, some of the ties are very old. They are purchased almost exclusively for use in landscaping. They are different from lumber properly within the scope in that they cannot be used for further manufacturing. They are sold through different channels of trade: railroads auction the ties to sellers who sell to Anderson and other importers who, in turn, resell to retail outlets.

In response, Commerce and Petitioners argue that there is no distinction in the characteristics of softwood lumber covered by the investigation between new and used lumber. They note that Anderson is unable to determine which ties may be hardwood and whether any were manufactured in the United States. Regarding the SLA, they argue that the coverage of that agreement cannot determine the coverage of the instant investigation and antidumping order. In particular, the first-manufactured requirement is not applicable under any principles relevant to the antidumping investigation. Moreover, they argue, there is no support for the proposition that used ties were not intended by the Petitioners to be included; rather Petitioners expressly stated during the investigation that

they intended to include the used railroad ties. Nor is there support for exclusion on the basis of the *Diversified Products* criteria.

The scope of the Petition and the Order is broad, as set out in the Final Determination, and includes all products classified under HTSUS 4407.1000, and specifically "Coniferous wood, sawn or chipped lengthwise ... of a thickness exceeding six millimeters...."[192] Many requests for exclusion were submitted, and several were granted for various reasons. As noted above, Commerce declined to act favorably on Anderson's request, and Anderson's complaint against the Order is now before the Panel.

In the IDM and its brief to the Panel, Commerce gave full consideration to each of the arguments advanced by Anderson. Although the goods in question were once creosoted timbers used as railroad ties, at the time of importation, for the purposes of the determination in question, they are treated timbers for use in landscaping. In fact, they are no longer railroad ties and they are not classified as such by U.S. Customs, but rather are classified under HTSUS 4407, merchandise that is expressly included in the scope of the Order. The classification of new railroad ties is not relevant. Nor does the SLA assist Anderson because it was a particular agreement made without reference to the antidumping laws. With regard to Petitioners' intention, as argued by Anderson, the scope of the petition and the subsequent submissions by Petitioners establish that Anderson's assertion is not correct.

Commerce' application of the *Diversified Products* criteria is reasonable. As with all determinations of class or kind, as discussed fully above, the application of the

[192] *See,* 67 Fed. Reg. 15,539 (April 2, 2002); *see also* 67 Fed. Reg. 36,068 (May 22, 2002).

*Diversified Products* criteria requires the exercise of judgment. Commerce explained its reasoning in the IDM at Comment 52, concluding that both the record evidence and Anderson's submissions fail to demonstrate that used railroad ties are different from other landscaping timbers. The Panel agrees. The timbers in question differ from other timbers used in landscaping only in that they have previously been used for another application and may be damaged and/or have split ends. However, they have the same application in practice. They are thus not essentially different from other treated timber that may be used in the same application and is sold through the same retail channels. Both used and new softwood lumber is within the scope of Order. Anderson was unable to support its assertion that some of the ties may be hardwood or were produced in the United States. Anderson has not persuaded the Panel that the exercise of judgment by Commerce was unreasonable with respect to used railroad ties.

Having regard to the foregoing, the Panel concludes that the determination by Commerce should be affirmed.

### 6. Commerce Correctly Included Softwood Lumber Products from the Maritime Provinces in the Scope of the Antidumping Investigation

The Maritimes[193] contend that Commerce should have exempted softwood lumber originating from the Maritime Provinces from the antidumping duty investigation. Maritime softwood lumber was excluded from the parallel countervailing duty investigation. The Maritimes assert that unique circumstances distinguish Maritime

[193] *See, Maritimes Case Brief* at p. 1 (This term refers to the Maritime Provinces (New Brunswick, Nova Scotia, and Prince Edward Island, Newfoundland and Labrador), the Maritime Lumber Bureau of Canada, and the softwood lumber producers in the Maritime Provinces).

lumber producers from the lumber producers in the rest of Canada[194] and so justify the exclusion of Maritime softwood lumber in this investigation as well. The Maritimes argue that Commerce has the authority to define the parameters of an antidumping duty investigation, including the ability to define the "country" from which the foreign merchandise originates. The Maritimes further argue that the definition of "country" may be interpreted to exclude particular provinces from an antidumping investigation where there has been no allegation or evidence of dumping provided with respect to those provinces.

The Maritimes claim that the agency's authority to define the parameters of an antidumping duty investigation must be exercised in light of all the facts available. Commerce, they assert, unjustifiably failed to fully consider the special circumstances surrounding the Maritimes.

Commerce responds that the scope of an investigation and of the subsequent determination fall largely within the agency's discretion. Commerce's general practice is to exercises that discretion to reflect the intent of the petition. In this case, the scope language of the petition covered all softwood lumber from Canada (subject to certain explicit product-based exceptions). The petition did not exclude softwood lumber from the Maritime Provinces; rather Maritime softwood lumber was, and is, treated as in-scope softwood lumber from Canada. Further, Commerce argues, it is the purpose of an administrative review, not an investigation, to determine the dumping margin, if any. If it

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[194] *See, Maritimes Case Brief* at p. 22-23. (The Maritimes claim their unique circumstances include the fact that the majority of the timber harvested in the Maritimes comes from private land which responds to market forces and that no artificial government forest regimes operate to force lumber production during period when prices cannot support the additional production. The Maritimes fully explain their special circumstances in their Case Brief at p. 2-14).

is found during a review that a Maritime lumber producer has not dumped subject merchandise, its deposit will be returned.

Commerce is not compelled to presume that all Maritime softwood lumber will be sold at fair value simply because the Maritimes have market-based lumber industries with few subsidies. Dumping orders exist against many countries with market-based economies. The existence or non-existence of subsidies, alone, does not provide Commerce with sufficient evidence to warrant a negative presumption as to the existence of dumping.

The Panel determines that the agency did not abuse its discretion in failing to exclude Maritime softwood lumber from the antidumping duty investigation. In so deciding, the Panel is cognizant of the applicable standard of review of reasonableness and the deference that ought to be accorded to Commerce in determining the parameters of the investigation. In this case, Commerce defined the parameters of the investigation as being softwood lumber products from Canada. There is no requirement that a Respondent be exempted from an antidumping investigation just because it is exempted from a parallel countervailing duty investigation. Antidumping and countervailing duty cases are separate investigations that address different issues. Commerce was within its discretion in maintaining a separate scope determination for this investigation from that of the parallel countervailing duty investigation.[195] Thus, the Panel finds that Commerce's determination to include the Maritimes in the antidumping duty investigation is in accordance with the law.

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[195] The Panel does not address whether the Department may define "country" to encompass a territory, province, or state rather than an entire country as we find the Department's determination to include all Provinces in the antidumping duty case to be in accordance with law.

### 7. **Commerce's Tardy and Truncated Solicitation of Comments Concerning the Scope of the Products Included Within the Class or Kind of Merchandise Under Investigation Did Not Violate the Parties' Due Process Rights**

Respondents allege that they were denied the right to be heard in a meaningful time and in a meaningful manner because Commerce allowed only three and a half business days to address the preliminary scope findings. They further allege that Commerce was not capable of fairly judging the merits of Respondents' scope arguments because Commerce left itself less than two days to consider those arguments before it had to issue its final determination. In sum, Respondents argue that:

1) The compressed schedule set by Commerce violated the Fifth Amendment right to due process by denying Respondents the opportunity to be heard in a meaningful time and in a meaningful manner,

2) The compressed schedule set by Commerce violated Commerce's own statutory and regulatory deadlines,

3) Commerce failed to publish notice of the scope hearing in the Federal Register, and

4) Commerce's actions were inconsistent with U.S. international obligations under the WTO Agreement on Implementation of Article VI of GATT 1994 ("Antidumping Agreement"), which incorporates basic due process guarantees for parties involved in antidumping investigations.

Respondents argue that Commerce did not afford them enough time to properly respond and comment on the final scope determinations. They note the traditional amount of time Commerce usually gives for preparation and submission of rebuttal briefs and the

lack of time in the instant case.[196] Due to the fact Respondents had a short period of time to consult with their clients and prepare and submit a rebuttal brief, they allege, among other things, their Fifth Amendment rights to due process were violated.

The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it".[197] All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard."[198]

Respondents' argument that Commerce did not leave itself enough time to make a fair decision is without merit. It appears that Commerce recognized the large amount of scope issues and consequently requested all interested parties to "submit comments regarding the scope of the investigation within twenty days after the publication of the Notice of Initiation." This was on April 30, 2001.[199] Commerce continued to receive comments on scope issues, and by November 6, 2001, had received scope requests covering approximately 50 products.[200] Commerce had gathered a variety of information from interested parties well in advance of making any final determinations. Respondents had the better part of a year to provide comments and make requests regarding scope issues before Commerce required written arguments in March. The fact that Respondents

[196] *See, Respondents' Joint Brief* at Vol. II, p. 8.

[197] *Matthews v. Eldredge,* 424 U.S. 319, 348 (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-172 (1951)).

[198] *Id.* at 349 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970)).

[199] *See, Commerce Brief* at Vol. II, p. 63.

[200] *Id.* at 63.

had insufficient time to respond to every scope determination does not automatically constitute a violation of their right to due process.

"An agency's reconsideration of its determination after issuance of preliminary results does not necessarily mean that the parties affected by the determination have been denied due process of law. A party subject to or affected by the review does not have a due process right to notice and comment on the agency's change in position if, throughout the agency's investigation, the party was reasonably on notice that the agency was considering the alternative ultimately used in the final determination." [201] Furthermore, an agency "is not required to afford interested parties an unlimited opportunity to comment on each modification of the agency's practice or procedure. To provide otherwise would be to unnecessarily burden the agency with an unending cycle of notices, comments, and responses."[202]

Respondents argue that Commerce violated its own statutory and regulatory deadlines. A statutory time period "is not mandatory unless it both expressly requires an agency or public official to act within a particular time period *and specifies a consequence for failure to comply with the provision*."[203] The fact that Commerce may have violated its own statutory and regulatory deadlines has no effect and provides no remedy to the Respondents.

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[201] *Peer Bearing Co. v. United States*, 182 F. Supp. 2d 1285, 1301-1302 (Ct. Int'l Trade 2001).
[202] *Id.* at 302 (quoting *British Steel PLC v. United States*, 879 F. Supp. 1254, 1317 (Ct. Int'l Trade 1995)).

[203] *Alberta Gas Chemicals, Inc. v. United States*, 515 F. Supp. 780, 785 (Ct. Int'l Trade 1981) (emphasis added) (quoting *Usery v. Whitin Machine Works, Inc.*, 554 F. 2d 498, 501 (1st Cir. 1977)).

Respondents make note of the fact that Commerce failed to publish notice of the scope hearing in the Federal Register. However, Respondents had actual notice of the scope hearing, rendering Commerce's lack of publication a harmless error.

Finally, Respondents argue that Commerce's actions were inconsistent with U.S. international obligations under the WTO Agreement on Implementation of Article VI of GATT 1994 ("Antidumping Agreement"), which incorporates basic due process guarantees for parties involved in antidumping investigations. Since the Panel has determined that Commerce complied with all requirements of due process under United States law, the agency's conduct can be sustained on that basis alone.

The statute and regulations obviously contemplate that Commerce should have published its scope determinations at an earlier time, and permitted more time for the submission and consideration of comments. Regrettable as Commerce's delays might be, however, the Panel finds that Commerce did not violate the Respondents' rights to due process.

## CONCLUSION

For the reasons set forth above, the Panel hereby remands this matter to Commerce for further proceedings consistent with this opinion. Specifically, the Panel remands this matter with instructions for Commerce to do the following:

1. To explain the factual background of Commerce's determination that, for purposes of determining Constructed Value (CV) profit, the "foreign like product" should be defined as each Canadian

Respondent's aggregate sales of subject merchandise during the period of investigation was reasonable and in accordance with law;

2. To re-allocate joint production costs using a value-based allocation methodology which takes into account dimensional differences between different jointly produced softwood lumber products;

3. To make an adjustment pursuant to 19 U.S.C. §1677b(a)(6)(c)(ii) to reflect dimensional differences between different softwood lumber products being compared;

4. To exclude exports made by Scieries Saguenay Ltee. (SSL) from the final LTFV determination rendered in respect of Abitibi-Consolidated Inc.;

5. To exclude from the cost of production and constructed value of softwood lumber products produced during the period of investigation by Abitibi the costs of redemption of stock options issued to executives of Donohue, Inc.;

6. To treat "trim blocks" produced by Abitibi Inc. as subject merchandise rather than by-products, and to allocate production costs to the trim blocks produced by Abitibi during the period of the investigation;

7. To explain the agency's reason for determining why, based upon an examination of the entire record, general and administrative expenses incurred in production of softwood lumber by Tembec Inc. according to parent company consolidated financial statements is reasonable and

lawful consistent with the agency's obligation, set out at 19 U.S.C. §1677b(b)(3)(B), to calculate such expenses "based on actual data pertaining to production and sales of the foreign like product";

8. To explain why Commerce's final determination concerning Tembec's credit expenses does not contain a clerical error with respect to programming language used to make currency conversions; or, if the final determination does contain such an error, to identify and correct the error;

9. To explain why Commerce's decision to use Tembec's internal prices for wood chips was representative of the cost of producing such wood chips, and why such prices constituted a reasonable and permissible basis for calculating an offset to Tembec's production costs;

10. To consider the claims of West Fraser Mills that Commerce erred in adjusting the offset to production costs resulting from West Fraser's by-product sales of wood chips to unaffiliated purchasers in British Columbia during the period of investigation, and particularly, to consider whether the timing of West Fraser's wood chip sales to unaffiliated parties during the early part of the period of investigation, and the existence of a long term contract, cause those sales to be not fairly representative of West Fraser's wood chip prices during the POI;

11. To provide a complete explanation of Commerce's decision that finger-jointed flangestock (FJF) does not constitute a separate "class or kind"

of merchandise for purposes of this investigation; and in so doing, to explain how the agency applied each of the *Diversified Products* factors to its consideration of FJF, the determinations reached with respect to each such factor, and how the agency weighed these factors in reaching its determination; and

12. To provide a complete explanation of Commerce's determination not to treat square-end bed frame components as a separate "class or kind" of merchandise for purposes of this investigation; and in so doing, to explain how the agency applied each of the *Diversified Products* factors to its consideration of square-end bed frame components, and how the agency weighed these factors in reaching its determination; and

13. To published revised less than fair value (LTFV) margins for the investigated Respondents, including a revised "all others" rate, as determined after carrying out the above remand instructions.

Commerce is directed to report its Determination on Remand within sixty (60) days from the date of this decision. Any participant thereafter wishing to challenge the Determination on Remand shall file such challenge within the time prescribed in Rule 73 of the *Rules of Procedure for Article 1904 Binational Panel Reviews*, and further proceedings, if necessary, shall be conducted in accordance with said Rule 73.

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Dated: July 17, 2003